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AIRCRAFT IN WAR

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AIRCRAFT IN WAR

BY

J. M. SPAIGHT, LL.D.

Author of "War Rights on Land"

ΠΡΟΜΗΘΕΥΣ. φεῦ φεῦ, τί ποτ' αὖ κινάθισμα κλύω
πέλας οἰωνῶν; αἰθὴρ δ' ἐλαφραῖς
πτερύγων ῥιπαῖς ὑποσυρίζει.
πᾶν μοι φοβερὸν τὸ προσέρπον.

ΧΟΡΟΣ. μηδὲν φοβηθῇς· φιλία γὰρ ἥδε τάξις πτερύγων θοαῖς ἁμίλλαις προσέβα
τόνδε πάγον.

. . . . . .

κραιπνοφόροι δέ μ' ἔπεμψαν αὖραι·

. . . . . .

σύθην δ' ἀπέδιλος ὄχῳ πτερωτῷ.

AESCHYLUS, *Prometheus Vinctus*, 124–135.

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NOTE

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The author has followed the Aerial Navigation Acts, 1911 and 1913, in using the word "aircraft" as either a singular or collective noun according to convenience.

COULSDON, SURREY.
June, 1914.

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AIRCRAFT IN WAR

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I

INTRODUCTORY

The Coming of the Aircraft of War

The fighting aircraft has, beyond all question, arrived and come to stay. The extraordinary development of the power-propelled aeroplane and, to a smaller degree, of the dirigible airship, within the last few years, has removed the question of aerial war from the subordinate place which it occupied when only wind-propelled, non-dirigible balloons were used as auxiliaries of armies (as they have been, off and on, since 1794) and has given it a prominence and importance which demand for it special consideration and independent treatment as a domain of war law. Tripoli, Mexico, and the Balkans have already seen aeroplanes employed in actual hostilities; all the great nations have used them in the war training, exercises, and manœuvres of their armies and fleets. One can hardly doubt that, unless some totally unexpected factors come into operation, the science of war and the science of flight have in our days formed an alliance which will outlast our generation and will in all probability endure as long as war itself.

The Impossibility of securing Finality of Rules

All the questions connected with the use of aircraft in war are new and constantly changing with the progress of flight. The variation in the efficiency of flying craft and their capabilities necessarily affects the finality of any rules which are proposed for application to them. In the crowded years since the Wright brothers made their biplane gliders, one has seen, in the span of a boy's life, the coming and passing of a hundred types, triplane, biplane, monoplane, waterplane, seaplane, flying-boat, supermarine, machines with front elevator and without, those with warp control and those with ailerons, with tractors or with propellers, with planes in alignment or set back, with planes staggered or superimposed, with stationary engines or rotary, with air-cooled engines or water-cooled, with fuselage members of ash, of silver-spruce, or of steel, with high-powered engines and small plane area, with low-powered engines and big planes, with the expression of a thousand different conceptions of shape, arrangement, lift, resistance and power. It is a far cry from the uncouth hencoops of flying machines which made history in 1908 and 1909 to the modern Avro, Sopwith, Blackburn, or Bristol, or the all-steel Vickers, Voisin, or Clement-Bayard of to-day. And the end is not yet. So far the aeroplane has developed along the lines of land service types. Now it seems that the sea is taking it in hand and is transforming it into something rich and strange in the shape of the British seaplane. When will *Finis* be written to the last chapter of the marvellous story of the rise and progress of flight?

The Legitimacy of Aerial War

To question the legitimacy of the use of aircraft in war is simply to plough the sand. The jurists who demanded the total prohibition of the new arm, at the Madrid Session of the Institute of International Law in 1911, were treading the same futile path as the Pope who issued the bull against the comet. One is bound to reckon with actuality even in academic discussions. How far some members of the Institute were from the safe ground of hard fact, may be judged from the words with which one of the opponents of the employment of war aircraft prefaced his remarks. "I regret very much," said one of the jurists, "that the progress of science has made aviation possible." This view goes far beyond the Chevalier Bayard's denunciation, many centuries ago, of the then newly invented musket—an invention of a purely destructive character and obviously less adapted than the aeroplane for use in peace. The introduction of steam transport by land and sea three-quarters of a century ago must have aroused similar misgivings in conservative minds, which could not see how civilisation would be benefited by the discovery of the new means of travel.

However jurists may argue, the prohibition of the use of aircraft in war appears nothing more or less than a beautiful dream. Can anyone, having in view the mine, the torpedo, the shrapnel-shell, or remembering what happened at the great redoubt of Borodino, the Bloody Angle at Cold Harbor, or 203 Metre Hill at Port Arthur, or how the Petropaulovsk was blown

to eternity in a few seconds, in 1904, condemn aircraft on the score of inhumanity as compared with existing engines of war? And, even if their employment for destructive work is forbidden, what practical possibility is there of restricting them solely to scouting and reconnaissance purposes?

The proposal made at Madrid in 1911 to allow their use for the latter purposes only is unrealisable and chimerical. Is a scout not to be fired upon by the troops whose movements he is observing, solely because he watches them from three thousand feet up? And, if he may be fired upon, can he be expected not to retaliate? Again, if the aerial scouts of one of the belligerents meet an enemy airman-scout, are they tactfully to ignore his existence and retire?[1] The fate of a campaign may depend on their preventing the enemy scout from returning to his base; are they to be bound by a paper rule to let him go without any attempt to stop him?

Impracticability of Prohibiting the Use of Aircraft

One must, willingly or unwillingly, accept as given and basic the facts of the case; and the facts of the case are that the path of the air has now been opened for man's passage as well as the paths of the land and the sea, and that every civilised nation has given unmistakable proof that it regards that path, like the

[1] There does not appear to have been any instance as yet of the encounter of opposing aircraft in war, although both the Bulgarian and the Servian armies contained *formations d'aérostiers*; see Lt.-Colonel Immanuel, *La Guerre des Balkans* (Paris, Charles-Lavauzelle, 1913), Vol. I. pp. 58 and 70.

others, as open for the march of its forces of offence and defence. To limit aircraft to observation work alone is quite impracticable, and it is idle to suppose that the Powers will accept a self-denying ordinance proscribing the employment of aircraft generally in war. It is indeed questionable whether it is in the interests of civilisation and progress that they should do so; as to the likelihood of their doing so, there should be no question nor misunderstanding whatever. Armies and fleets will never surrender the right to use such an enormously effective and important means of observation and intercommunication as the present-day aeroplane constitutes. The St. Petersburg Declaration of 1864, as to explosive bullets, and the Hague Declarations as to expanding bullets, asphyxiating gases, and the discharge of projectiles from balloons (as to the last of which more will be said later)[1] form no proper precedent to justify the claim that aircraft could or should be banned as a weapon of war.

The Declarations referred to are concerned with particular weapons or methods of attack which are minor and non-essential elements in the armoury or methods of war. Success or failure in war can never hang on the use of soft-nosed or elephant bullets, or of deleterious gases; and the jettison of bombs from balloons before 1905, when the Hague Declarations of 1899 on the subject expired (the later Hague Declaration is a dead-letter), was never a matter of supreme importance in deciding the fate of campaigns. But the use of aircraft may change the whole face of war. No such potent instrument for piercing and

[1] See pp. 30–34.

dissipating the "fog of war" has ever been placed in the hands of commanders. Secrecy of movement and suddenness of stroke have always been *arcana vincendi*. "Always mystify, mislead, and surprise your enemy," was a maxim of Stonewall Jackson's. He practised what he preached: witness the Shenandoah campaign, when he left Banks, Shields, McDowell, Fremont "the Pathfinder," amazed, bewildered, outgeneralled by his unfathomable strategy. The great success of Napoleon's Italian campaigns was due to the unexpectedness and rapidity of his appearance on the front of his adversaries. The value of aerial scouts in discovering and reporting the enemy's position and intentions requires, in truth, no demonstration.

Is it probable that, with such help available, for aircraft will continue to be used in peace, even if banned in war, and there will always be civilian aircraft to be impressed, a commander will hesitate to use it, or that the military opinion of the world will accept the prohibition of a means of information of such extraordinary value? The test of the legitimacy of any engine of war is, in the end, its effectiveness; if the results which it achieves are sufficiently great to be regarded as justifying the incidental suffering of its victims, if its "bag" is large enough, then the conscience of the world has no difficulty in approving its use. Hence shrapnel and torpedoes are allowed, while expanding and exploding bullets are condemned, as were also bomb-dropping balloons when their use was not considered as of any military importance. There is neither any probability, nor indeed any really strong reason, for denouncing the employment of aircraft as an arm of war.

The Development of Flight helped by its Adaptation to War

However one may deplore war and the necessity for war, it may be that the world will benefit in the end through the use of aircraft for hostilities. The great speed, strength, and reliability of the best modern flying machines are most unquestionably due in no small degree to the association of flight with the military science. Flight owes a heavy debt to naval and military airmen and to the War Departments and Admiralties of the progressive nations. Neither the daring experiments of the service flyer nor the open purse of his Government would have been available to help in encouraging and perfecting flight if the young science had not held out the promise of huge possibilities for purposes of attack and defence. The result has been, not only the actual pecuniary help which private enterprise in the design and manufacture of aircraft has received in the shape of Government orders, but also the opportunity for a wider and more exhaustive range of experiment. The work down by such Government factories as those at Farnborough and Chalais Meudon, which would hardly have come into being but for the adaptation of aircraft to hostilities, has undoubtedly been of great service in the development of flight; for whatever be the shortcomings of State-controlled manufacture and design, one finds in such work at least the absence of the commercial factor, of the competition and hustle of business life, and the presence of that leisureliness and thoroughness which it is difficult to secure in industrial undertakings working for a profit. If, as some think,

flight eventually kills war—and everything that brings nations closer makes for that end—it will at least be chargeable with ingratitude to an ancient ally and former helper.

How Aircraft will be Employed in War

It may be safely taken, then, that aircraft have secured a firm and lasting foothold in war. How exactly will they be used by commanders? First and chiefly, as scouts: the service of information will be their special and most important *rôle*.[1] They will also be used for the transmission of messages, for maintaining intercommunication between columns and armies, for carrying staff-officers, for observing the effects of artillery fire,[2] for locating submarines and mines. Bomb-dropping or immediately destructive work of other kinds will also certainly be part of their duties, on account not only of the material damage caused but

[1] In a lecture at the Royal United Services Institution on 15th November, 1911, Major (then Capt.) C. J. Burke, Royal Flying Corps (then Air Battalion), pointed out, very truly, that aircraft would be likely to prove a greater asset to French than to German strategists. The German doctrine of war lays down a system of enveloping attack, of driving in the enemy's front, flanks, rear, if possible, by weight of numbers, of overwhelming him by hard and relentless fighting at all points. French strategists, on the other hand, prefer to manœuvre first and thereby to discover the enemy's weakness, to hold him at many points but to concentrate the main effort on one and to throw upon that point, when found, the mass of the available troops. It is obvious that a knowledge, such as aerial scouts can supply, of the enemy's dispositions and strength, will be more advantageous to a commander of the French school of war than to one of the German.

[2] Colonel Bernard, the French Artillery expert, has stated that "two batteries and one aeroplane are five times more redoubtable than three batteries without an aeroplane."

also of the moral effect of such a method of attack.[1]

For the present a secondary *rôle*, bombarding seems bound to become in time as usual and important a part of the duties of the military airman as reconnaissance is to-day. Already the German Zeppelins can carry a ton and a half of explosives, and the carrying capacity of aeroplanes is being increased daily. Ingold's tanks held 136 gallons of petrol in his great flight of 1,300 miles, and an entrant for the trans-Atlantic aerial journey even proposes to carry 400 gallons. Soon one will see in existence aeroplanes able to lift and to discharge with safety weights of explosives which could destroy a Dreadnought.[2] For all purposes of war the aeroplane seems destined to surpass the dirigible; the latter's chief advantages at present—its greater lifting power, its hovering capacity, and its ability to travel in the darkness—are not likely to remain unchallenged long by the heavier-than-air machines. When the latter become really automatically or inherently stable, when they are able to travel dead slow and to work at night, and when they

[1] A further use to which aircraft can be put was illustrated at the recent siege of Adrianople. The Bulgarians employed an aeroplane to drop into the city a large number of notices, written in Turkish, informing the citizens of the uselessness of further resistance and advising them to surrender (Gustave Cirilli, *Journal du Siège d'Andrinople*, p. 56). Similar notices were fired into Port Arthur from a wooden mortar by the Japanese in 1904 (Ariga, *La guerre russo-japonaise*, p. 265), and one may expect to see a repetition of the Bulgarian experiments in future sieges.

[2] Indeed, existing aeroplanes of certain types already weigh, fully loaded, as much as a powerful touring motor car. The Grahame-White biplane, on which R. Carr won the British Empire Michelin Cup in November, 1913, weighed 3,000 lbs., all in, and the new Short seaplane (160 H.P. Gnome), with wireless plant, full petrol, and oil tanks, and two airmen, weighs about the same.

are capable of carrying at least a few hundredweights of dynamite, their use for destructive raids is bound to become of very great importance.

Raids by Bomb-dropping Aircraft

There is something which holds the imagination in the thought of raids by destroyers of the air. Mr. H. G. Wells has lately painted a vivid picture of the wholesale destruction of capital cities by aeroplanes, driven by atomic engines and discharging atomic bombs. The unimaginative writer is naturally more cautious in forecasting the future of aerial war. It is unlikely that civilised nations will ever wreck one another's purely residential and commercial cities. But judging by what has actually happened in past bombardments by land and sea, by the fate of Strassburg, Soissons, Verdun, Montmédy and other towns, one is justified in assuming that aircraft will be within their war rights in dropping dynamite even on the non-defended parts—the civilian quarters—of cities which are *defended* at other points. They will not be bound to confine their attacks to the perimeter of forts. In practically every siege in modern times the guns of the besieging force have been turned on the town as well as on the defences. The evidence is supplied by sieges in which the troops, not of Germany only, but of Great Britain, Japan, and the United States have been the assailants.[1] "No legal duty exists," says the

[1] The modern precedents, from actual warfare, are collected at pp. 158–166, *War Rights on Land*. Adrianople, though "protected" by a girdle of forts, suffered severely in the bombardment by the Servians and Bulgarians, 1912–13; see G. Cirilli, *Journal du Siège d'Andrinople*, pp. 96–104, 141–3.

British official manual on Land Warfare, "for the attacking force to limit bombardment to the fortifications or defended border only. . . . A town which is defended by detached forts, though they are at a distance from it, is liable to bombardment, for the town and forts form an indivisible whole." It is unlikely that any different rule will be followed in aerial attacks on defended cities.

Aerial Attacks on Undefended Cities

The question of aerial attacks on *undefended* cities is a more difficult and complex one. It was raised lately in a very interesting lecture delivered at the Royal United Services Institution by Colonel L. Jackson, late R.E., and his remarks attracted so much popular attention, as indicated by comments and correspondence in the Press, that I make no apology for dealing with the matter at some length. Col. Jackson stated that, in the wars of the future, aircraft would drop bombs on coast batteries, dockyards, magazines, and stores, ammunition factories, oil reservoirs, wireless stations, and *great centres of population.* "If a Geneva [Hague] Convention were sitting now," he said, "and the point were to be raised that a capital which is easily accessible to the enemy may claim exemption from attack on the ground that it is unfortified, would not the answer be, 'Yes, provided that it is prepared to submit and not offer resistance to the enemy's armed forces'? And whether the armed force takes the form of troops ready to advance or of the power to destroy resistance by attack from the air, the principle is the same. Can any student of International Law

tell us definitely that such a thing as aerial attack on London is outside the rules; and, further, that there exists an authority by which the rules can be enforced? It seems to me that we cannot help accepting the fact that, in three years or less,[1] London will be exposed to the form of attack I have indicated." In the discussion which followed the lecture, General D. Henderson, the chairman, expressed the view that "to sail an airship over London and to drop bombs here and there would be quite opposed to the ethics of warfare as we at present understand them," and this view was supported by Professor T. E. Holland in a letter, referring to Col. Jackson's lecture, which appeared in the *Times* of 27th April, 1914. Prof. Holland pointed out that the Hague Convention, No. IV. of 1907, *i.e.*, the Convention to which the *Règlement* dealing with the conduct of land warfare is an annexe, forbids the bombardment of undefended towns *par quelque moyen que ce soit*, and that the words italicised "were inserted in the article deliberately and after considerable discussion in order to render illegal any attack from the air upon undefended localities; among which I conceive that London would unquestionably be included."[2]

Prof. Holland, in a subsequent letter, modified his view as expressed above. Col. Jackson had, in the meantime, raised the question, also in the columns of the *Times*, "When is a town 'not defended'?" "I presume," continued Col. Jackson, "when it submits

[1] Col. Jackson anticipates such a development of the aerial power of France and of Germany within the next three years that each of these countries will by then have fleets of 40 or 50 airships, with a carrying power of 40 tons, a speed of 60 miles, and a range of 1,500 miles.

[2] The Articles of the Hague *Règlement* relative to Bombardment in Land War are given in Appendix VII.

without any opposition to the authority of the enemy . . . . I will put an extreme case. The commander of an enemy's war-balloon might arrive over London if unopposed and signal, as a matter of courtesy, 'I am going to drop explosives.' We answer, 'You cannot drop explosives, we are not defended.' The commander replies, as it seems to me quite logically, 'Then you surrender. Good. You will now obey orders.' . . . . The new factor in warfare will shortly make a direct attack on London possible within a few hours of the declaration of war. The Hague Convention as worded does not appear to provide an adequate safeguard."

Professor Holland's View

The reply of Professor Holland (in the *Times* of May 5th, 1914) was virtually an admission that the question is an open one. He begins by referring again to the Hague rule, and then continues:—

"So far good; but further questions arise, as to which no diplomatically authoritative answers are as yet available; and I, for one, am not wise above that which is written. One asks, for instance, what places are *prima facie* 'undefended'? Can a 'great centre of population' claim this character, although it contains barracks, stores, and bodies of troops? For the affirmative I can vouch only the authority of the Institut de Droit International, which, in 1896, in the course of the discussion of a draft prepared by General Den Beer Poortugael and myself, adopted a statement to that effect. A different view seems to be taken in the German 'Kriegsbrauch,' p. 22. One also asks:— Under what circumstances does a place, *prima facie* 'undefended,' cease to possess that character? Doubtless so soon as access to it is forcibly denied to the

land forces of the enemy ; hardly, to borrow an illustration from Colonel Jackson's letter of Thursday last, should the place merely decline to submit to the dictation of two men in an aeroplane."

It appears, therefore, that of the premises to which the answer to Col. Jackson's question—(Is London liable or not liable to aerial attack ?)—should provide the conclusion, Prof. Holland has a definite reply to the major only, not to the minor. He answers that an undefended city is not liable to bombardment, but he cannot state authoritatively that London would be looked upon as an undefended city. Therefore, he is unable to give any firm ruling as to London's liability to aerial attack.

Most students of International Law will, I think, share Professor Holland's doubts as to London's security, though they may not arrive at his conclusion by exactly the same process of thought. Prof. Holland, it will be observed, regards the question as being governed by Article 25 of the Hague *Règlement* ("The attack or bombardment, by any means whatever, of undefended towns, villages, dwellings, or buildings, is forbidden"). The obvious objection arises that this rule is a rule of *land* warfare and might be held not to apply to bombardment by seaplanes or by dirigibles attached to a fleet. But as the same rule, except for the omission of the words "by any means whatever," of which omission a civilised belligerent would be unlikely to take advantage, appears in the Convention on Naval Bombardments, one may waive the objection when considering the bearing of the Article, taken by itself, on the point under discussion.

Bombardment of Occupied, but not Defended, Cities

Does the Hague (land war) rule, then, cover the bombardment of a city which, though not defended, is occupied by troops, as one must anticipate that London, with its many barracks, would be even after mobilization? Apart from the evidence of the literal wording of the Article, which says "undefended," not "unoccupied by troops," the only authority which Prof. Holland can quote is the view of the Institute of International Law as expressed at its session of 1896. That view has no official authority, the Institute being a wholly unofficial body of international jurists, though, from the eminence of its members, its pronouncements are always entitled to respect. Against it must be set the much more instructive and important provisions on the subject of the British and German official manuals for the guidance of troops in war. Both recognise the belligerent's right to bombard towns which are occupied, even though not actually defended. The British Manual ("Land Warfare," § 119) is especially explicit. "The defended locality," it states, "need not be fortified [to justify bombardment] and it may be deemed defended if a military force is in occupation of or marching through it."

The view expressed in the British Manual was put forward in *War Rights on Land*, which was written before the official manual appeared (the old manual—edited by Prof. Holland—was silent on the point), and was criticised by a very able reviewer as being contrary to the Hague *Règlement*. I submit, nevertheless, that it is the only possible view. A belligerent is entitled to seek out and destroy the armed forces of

his enemy wherever found. If they choose to take up position in a crowded city, he cannot be prevented from attacking them there because to do so would cause damage to buildings and property; and he cannot be forced, because of his enemy's action, to lay his artillery aside and resort to the costly tactics of street-to-street fighting to clear the other troops out of the city. Were it otherwise, an army threatened with destruction could escape by simply retiring into a large city, which would thus have attributed to it a power of sanctuary extending beyond even that attributed to neutral soil. There are historical precedents for the shelling of occupied, though not "defended," towns, and I do not think that they were cases of belligerents' exceeding their war rights.

It seems to me, therefore, that a belligerent would be justified as interpreting "undefended" in the Hague rule as meaning "not occupied by troops or otherwise in a position to offer armed resistance," and that such a city as London cannot rely for immunity against attack on Article 25 of the Land War *Règlement* or on the corresponding Article 1 of the Convention on Naval Bombardments.

Bombardment of Military Stores in Undefended Cities

If one approaches the question in a rather different manner, one finds the case against London stronger still. In the Convention on Naval Bombardments, one finds a provision that, though undefended ports, towns, etc., may not be bombarded, any military works, establishments, depots of arms, or material, workshops, or plant which can be utilised for the needs

of the hostile army and fleet, which happen to be in such ports or towns, may be destroyed by artillery, "after a summons followed by a reasonable interval of time, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed." The commandant incurs no responsibility for any damage resulting from such a bombardment. Furthermore, it is recognised expressly that *des nécessités militaires, exigeant une action immédiate* may make it impossible to grant any delay, and in such a case the commander must take all due measures to ensure that the town may suffer as little harm as possible. The text of the Naval Convention is given in Appendix VII., as are also the Articles of the *Règlement* relative to Land Bombardments.

This Convention, it will be seen, differs from the Land War *Règlement* in subjecting the prohibition of the bombardment of undefended towns to a very important proviso. The reason for the modification is given in the Blue Book which contains the Protocols of the Second Peace Conference (Cd. 4081, 1908). Usually, a land commander would have no need to resort to bombardment to destroy any military works or depots in an undefended city ; he could, for instance, send in a force to destroy them. But it is different with a naval force ; the commander might find it impossible to spare a landing party, or he might have to withdraw rapidly, and therefore he is allowed a right of long distance destruction which is denied, or at least not expressly granted, to a land commander.

The reasons for which this right was given to naval commanders appear to me to apply equally or with greater force in the case of attack from the air. The

impracticability of landing to carry out the destruction and the possibility that a hurried withdrawal on the part of the attacking force, owing to the feared arrival of a hostile body, may be necessary, are even more clearly existent in an aircraft than in a warship raid. It seems to me, therefore, that the rules of the Naval Bombardment Convention will be applied to aerial bombardment. M. Fauchille and M. d'Hooghe (to anticipate a little) make the rules of either the Land or Naval Bombardment Convention applicable to air attacks: which means that an aerial commander would have the same right as a naval commander to destroy military storehouses in an undefended city at long range. It is practicably certain that the maritime rules will govern bombardments by seaplanes or dirigibles attached to the sea service, and it is extremely unlikely that a different set of rules will be framed for land types.

I think, therefore, that a raiding aircraft force would be entitled to drop bombs on the various depots, etc., which are referred to in Article 2 of the Convention on Naval Bombardments, and that such a force, even more than a naval force, would be able to justify dispensing with any warning of the intended attack and with the granting of any respite before it is delivered. The fuel tanks of aeroplanes and even of dirigibles are of limited capacity, as compared with warships' coal bunkers, and every moment an aircraft is under power and in the air lessens its radius of action. Moreover, the locality of any force of the enemy's aircraft which might come to the threatened town's assistance would be still more difficult to fix than the locality of his warships, which could in any case only

move at one-third or one-fourth of the speed of an aerial force. Rapidity of action will be absolutely essential to the success of an aircraft raid. One must expect sudden and unexpected strokes from these destroyers of the air.

Buildings, etc., which may be Bombarded

The exact limits of a belligerent's right of destruction under the Naval Convention are not very clearly defined. The phrase, *Ateliers et installations propres à être utilisés pour les besoins de la flotte ou de l'armée ennemies*, is especially wide in significance. Dr. Pearce Higgins says :[1] "The word 'installations' was adopted to cover such works as are not solely for warlike purposes. An undefended coast town may be an important railway centre, or have floating docks of great value for the repair of vessels; these are intended to be included under 'installations.' The word 'provisions' was inserted in one of the drafts, but 'matériel de guerre,' an extremely wide term, was ultimately substituted. This Article might, and probably will, be held to confer a right on a commander to destroy by bombardment railway stations, bridges, entrepôts, coal stacks, whether belonging to public authorities or private persons." Any considerable stocks of fuel oil, or petrol, the workshops of contractors who supply the Army or Navy with stores or material of any kind, great warehouses in which stocks destined for the services are stored before purchase, the workshops or yards of firms manufacturing aircraft or the parts and accessories of aircraft, aero-engines, steel-tubing, propellers and other component parts,

[1] *The Hague Peace Conferences* (1909), p. 355.

might be added to Dr. Higgins's list. Private flying schools would also probably be bombarded, the justification being that destroying them would deprive the enemy of a means of training airmen for service in the war.

London's Liability to Aerial Bombardment

London, it is hardly necessary to point out, contains within its vast area some of the possible targets of attack referred to in the above paragraph. If the rules of the Naval Convention apply (as they probably will) to air bombardment, then I can see nothing in International Law to prevent an hostile aircraft force from dropping bombs on Chelsea, Wellington, Albany, or Knightsbridge Barracks, or on the Clothing Factory or Depot at Pimlico, or on Euston, King's Cross, Waterloo, and other great railway termini. Many commercial undertakings which hold orders for the War Department or Admiralty would be liable to bombardment also. So, probably, would be the War Office and Admiralty, and the headquarters of the Eastern Command and the London District.[1] The various Territorial Force headquarters all over London also appear possible legitimate objects of attack.

If it is argued that, for humanitarian reasons, a belligerent (a naval commander, at any rate) would

[1] "Now, suppose that . . . the town contains government stores or factories, or *important government offices from which orders relating to the war are issued.* These are things exposed to lawful destruction, and cannot claim to be spared because in the circumstances they can be destroyed only by fire from the sea, but the enemy is bound to take care that he does no avoidable damage to life or to innocuous property. This is the justification . . . of the opinion which has been given by a large number of international lawyers of all countries that the government offices at the Hague, which is virtually a coast town, might be bombarded."—Westlake, *International Law*, Part II. p. 77.

refrain from exercising his right of bombarding a great commercial city, one has merely to point to the events of recent military history to refute such a plea. Not only have the commanders of besieging forces shown themselves indifferent to the loss and suffering caused by their cannonade to the civil populations of *defended* cities, as the terrible bombardments of Strassburg, where 10,000 people were made homeless, and of other cities in 1870, prove; but there are cases in which *undefended* cities have been grievously damaged by shells directed against Goverment stores therein. Genitschi and Taganrog were bombarded in the Crimean War because they refused to surrender such stores, and very great damage was done to private property in both cities. Indeed, the Naval Convention makes it clear that an assailant is justified in hardening his heart against any feelings of sympathy with non-combatant residents in cities containing military depots and store-houses which he is entitled to destroy. The sufferings of these residents are but an unfortunate incident of the execution of an approved act of hostilities and complaint is useless. International Law enjoins respect for the lives and property of pacific citizens in war time, but it recognises that war is war and that non-combatants may have to suffer when they or their property are unlucky enough to be near a scene of operations or military stores and plant which the enemy has a clear war right to destroy.

How London may be Safeguarded

Still, when all is said, to bombard a city like London *from the air* would undoubtedly be an extreme

and unprecedented act of belligerency. Certain portions of London are, as I hold, liable to bombardment—the portions, that is to say, in which troops are stationed, or in which military stores are held, or in which there are *ateliers et installations*, public or private, which supply the armed services; yet a foe would probably shrink from exercising his right of destruction. One deterrent would be, as General Henderson pointed out in the discussion on Colonel Jackson's paper, the odium to which such an act, though legitimate, would give rise. For, although the cases which I have quoted above show that large cities have been roughly handled in many cases by assaulting belligerents, it is a very different thing to set a new precedent in fighting and to carry on the tradition of years. The custom of war is very largely merely a record of what has been the actual practice of commanders. The first leader who fired into a tall city not only made, actually, round-shot (or whatever it was that he rammed down the muzzle of his primitive, unrifled ordnance), but also, metaphorically, a small snowball of precedent which has gone on growing larger and larger and more difficult to dissolve ever since his day. A belligerent who took the initiative in bombarding a great modern city from the air would do well to consider whether his own cities were surely guarded from a similar method of attack. Aerial bombardment might, of course, be attempted by a very ruthless enemy who was confident of his ability to defend his own cities. To guard against the danger threatened from such a foe, three courses appear open. First, it might be possible to frame an International Convention declaring great mixed agglomerations of population immune from

aerial attack, even though garrisoned and containing establishments, installations, etc., which it would be legitimate to bombard in naval war. Secondly, all barracks and garrisons, and all stores and factories, public and private, of war material and supplies, might be removed from such cities, and any railway termini within their area converted into underground stations. It is probable, in any case, that in a few years magazines, fuel tanks, and important stores of munitions will be universally subterranean. Thirdly, the national defences against aerial attack, anti-aircraft artillery and aerial destroyers, armoured and armed, might be made so efficient and powerful that no foe would venture to attempt a raid.

The Sanction of International Conventions

It is, of course, possible that an International Convention might not be respected by an unscrupulous belligerent, and that even if London were declared immune, it might still be bombarded in contravention of the solemn agreement. What is there to prevent this? It is true that, as General Den Beer Poortugael said, "the law of nations has not fleets nor armies to make itself respected." But it has a sanction, nevertheless. For one thing, no clear breach of the written or unwritten laws of war is passed over in silence in these days. Retribution follows assuredly in a lessened respect for the humanity and civilisation of the offending nation's statesmen and troops in the community of powers. National reputation is an asset that is highly prized by modern States north of the Danube. A country does not lightly throw away its fair fame as a

gallant and scrupulous belligerent and its reputation for waging clean and honourable war. Still stronger is the other sanction—the certainty that reprisals will follow if the injured Power is strong enough and determined enough to avenge itself. The destruction of London by a belligerent who had bound himself to respect it would be only the first scene of a tragedy. The second would be played by the guns of the British fleet and the bombs of the British seaplanes. A belligerent who breaks international agreements or the laws of war when it suits his purpose, is really sowing the wind to reap the whirlwind.

Nature of the Questions which Arise

Many other questions than that concerned with the war right of bombardment are raised by the employment of aircraft in war. How will military aircraft be distinguishable from non-military? A distinction is necessary, because a commander is entitled to know who are his armed enemies and who are unarmed non-combatants, whether on land or sea or in the air. Will the crews of military aircraft be required to wear uniform or other distinguishing marks? Will aircraft belonging to private individuals of enemy nationality be confiscable, as enemy merchant-vessels are at sea, or will they be immune like private enemy property, generally, on land, or will they, finally, be classed with the private property which an invader may seize to prevent his enemy from making use of it, but which he must restore at the peace? What will be the rules as to private aircraft attempting to enter or leave a blockaded port or a besieged town? Under what

circumstances, if any, will it be permissible to shell private aircraft? What will be the criterion of spying by aircraft?

Then there is a series of important, and difficult, questions relating to neutrality. Will belligerent aircraft be allowed to fly across neutral territory? Will they be entitled to land therein, or to enter neutral ports if proceeding by a sea route? Will a neutral State have to forbid its airmen to enter belligerent atmosphere? May a neutral State sell its obsolete aircraft to the War Department or Admiralty of a belligerent Power? May neutral contractors—private individuals or firms—do so, without infringing their country's neutrality? Will the *Alabama* rule be applied to aircraft, and will a neutral Government be bound to prevent dirigibles or aeroplanes, intended to be used in the war, from being dispatched from its territory or coastal waters, even as a commercial venture? Will rules be necessary as to contraband, "visit," and prize-courts? Will a belligerent who invades enemy territory, and finds therein aircraft which are the property of neutral nationals, be entitled to seize them? Will he have any right to seize aircraft dispatched on the wing from a neutral contractor's workshops to the enemy country?

Arrangement of the Book

The great question of the freedom or sovereignty of the air, must be dealt with before the others are taken in hand. On the answer to this question depends the solution of another vexed question, namely, whether entry of neutral atmosphere by belligerent aircraft is

permissible or not. Before approaching these problems, it is desirable to state clearly the existing provisions of the Conventions and Declarations regarding aircraft, and to glance briefly at some of the projected codes.

In the Appendices are given the code proposed by me, some codes suggested by French and German jurists, the rules approved by the Institute of International Law, and the International Law Association, some extracts from International agreements, British legislation affecting aircraft, and a *précis* of the Franco-German agreement as to the admission of German aircraft into France and of French aircraft into Germany.

II

REFERENCES TO AIRCRAFT IN THE HAGUE LEGISLATION

Flight Practically Non-existent before Hague Conferences

When the first Hague Conference sat in 1899, flying, as we know it to-day, was non-existent. The father of modern flight, Lilienthal, had made successful gliding experiments in 1889, and work on the lines opened up by him was carried on during the "'nineties" by Pilcher in England, by Chanute in America, and by Ferber in France. The glider was the embryo of the heavier-than-air, power-driven machine. When the brothers Wright took it in hand, "the thing became a trumpet"; their principle of control of stability by warping the wings was an immensely important contribution to the development of flying. But their machines were still considered simply ingenious playthings of little practical importance even in 1907. Santos-Dumont, the Brazilian millionaire, who made another step forward in the march to the conquest of the air, made his public flight, for the Archdeacon cup, in October 1906, or the year before the second Hague Conference (1907); but it was not until Henry Farman's pioneer flight of one kilometre in January 1908, followed by A. V. Roe's first flight in England, the

Wrights' wonderful successes in 1908 and 1909, and Blériot's epoch-making journey from Dover to Calais in July 1909, that the world awoke to the fact that men could fly. One is not therefore surprised to find that the references to aircraft in even the second series of Hague Conventions and Declarations (1907) are few and unsatisfactory.

The Hague Legislation

The references are as follows :—

(1) *Hague Declaration of* 1907 *prohibiting the Discharge of Projectiles and Explosives from Balloons.*

"The Contracting Powers agree to prohibit, for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature.

"The present Declaration is only binding on the Contracting Powers in case of war between two or more of them.

"It shall cease to be binding from the time when, in a war between the Contracting Powers, one of the belligerents is joined by a non-contracting Power.

. . . . .

"In the event of one of the high Contracting Parties denouncing the present Declaration, such denunciation shall not take effect until a year after the notification made in writing to the Netherlands Government and forthwith communicated by it to all the other Contracting Powers.

"This denunciation shall only affect the notifying Power."

(2) *Article* 25 *of the Hague Règlement respecting the Laws and Customs of War on Land.*

"The attack or bombardment, by any means whatever, of towns, villages, habitations, or buildings which are not defended is forbidden."

(3) *Article* 29 *of the same.*

"An individual can only be considered a spy if, acting clandestinely, or on false pretences, he obtains, or seeks to obtain, information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

"Thus, soldiers not in disguise who have penetrated into the zone of operations of a hostile army to obtain information are not considered spies. Similarly, the following are not considered spies : soldiers or civilians carrying out their mission openly, charged with the delivery of dispatches intended either for their own army or for that of the enemy. To this class belong likewise *individuals sent in balloons* to deliver dispatches, and generally to maintain communications between the various parts of an army or a territory."

(4) *Article* 53 *of the same.*

"An army of occupation can only take possession of cash, funds, and realizable securities, which are strictly State property, depots of arms, means of transport, stores and supplies, and generally all movable property of the State of a nature to be of use for operations of war.

"All means employed on land, at sea, *or in the air*, for sending messages, for the carriage of persons or things, apart from cases governed by maritime law, depots of arms, and generally, all kinds of war

material, may be taken possession of, even though belonging to private persons, but they must be restored, and the compensation to be paid for them shall be arranged for on the conclusion of peace."

The Discharge of Projectiles

The provisions at (1) and (2) above are closely interconnected. One of the Hague Declarations of 1899 prohibited for five years (which expired September, 1905) the discharge of projectiles or explosives "from balloons or by other new methods of a similar nature." At the second Peace Conference in 1907, the Russian delegation proposed to make this prohibition permanent, but to limit its application to *undefended* towns, etc. The proposal was accepted, in effect, by the insertion of the words "by any means whatever" in Article 25 of the *Règlement;* these words being understood by the Conference to have special reference to bombardment by aerial forces. The Declaration was only altered to the extent that, for the old limitation to five years, was substituted a period ending with the close of the third (*i.e.*, the next) Hague Conference. The practical effect of the Declaration is *nil.* Though it has been accepted by Great Britain, the United States, Austria, Belgium, Bulgaria, Greece, Norway, Holland, Portugal, Switzerland, and Turkey, it only binds these Powers in wars between themselves, not in a war with a non-signatory Power or in one in which a signatory Power is joined by a non-signatory; and among the non-signatory Powers are Germany, Denmark, Spain, France, Italy, Japan, Montenegro, Roumania, Russia,

Servia, and Sweden. The latter countries reserve the right to discharge projectiles or explosives from aircraft against such places as cannot be considered "undefended." In the late Balkan war, although Turkey, Bulgaria, and Greece were parties to the Declaration, they were not bound by its terms because two non-signatory Powers, Montenegro and Servia, were engaged in the war. It is probable that the list of States declining to accept the Declaration will be swelled still further, after the next Conference, and that the provision, already moribund, will soon be quite dead.

Inadequacy of the Hague Provision

Even apart from the reservations made, the usefulness of the Hague Declaration is extremely doubtful. It prohibits absolutely bomb-dropping from aircraft; but would that prohibition continue binding if the aircraft were themselves bombarded from below? The Declaration does not say that they are not to be shelled and it is not in human nature to take blows without giving them. In effect, the Declaration goes far beyond the intention of the framers. It takes from airmen all their power of self-defence; it does not restrict their liberty to carry out reconnaissance and other work not immediately destructive, but it condemns them, alone of all scouts and intelligence *personnel*, to run the gauntlet of shot and shell without having the right to reply. Carried to its logical conclusion, it almost proscribes the use of aircraft for even the service of information.

The Hague rule quoted at (2) refers only to land

warfare, as do also those at (3) and (4). The provision for naval warfare corresponding to (2)—the Hague Convention on Bombardment by Naval Forces, the terms of which are given in Appendix VII.—contains no such implied prohibition of bombardment of undefended places from the air: the words "by any means whatever" having been omitted, probably through an oversight, from that convention. It is unlikely, however, that any belligerent would take advantage of this omission (which will, no doubt, be rectified at the next Peace Conference) to justify bombarding an absolutely undefended port. Even as the Convention stands, a belligerent's war right of bombardment in sea warfare is wide and unrestricted enough. He can shell an undefended town, for instance, if it does not comply with a requisition for supplies; and he need not refrain from destroying any workshops, storehouses, and military or naval establishments because to destroy them would involve, necessarily, the wrecking of neighbouring parts of the city. If the city suffers, it is simply a case of peaceful property being engulfed in the backwash of war—a contingency which the law of war recognises and condones. The terms of the Convention on Naval Bombardment are fuller than those of the Hague *Règlement* on the subject, and it is probable that the former will be applied, so far as pertinent, to aerial bombardment. I have already dealt with the question of aircraft raids (see pp. 10–24, *supra*) and nothing remains to say here. In Article 10 of my draft code I propose that air bombardments should be subject to the same rules as Naval bombardments (for which rules see Appendix VII.), but I add a provision that they must in all cases be approved by

high military authority. There is a precedent for this in the Hague rule which forbids the collection of a "contribution" in land war except *sous la responsabilite d'un général-en-chef.* The conditions of air bombardments will be different from land and sea bombardments. If any subaltern or even non-commissioned officer were at liberty to drop bombs on a town which refused his requisition for petrol, the door would be opened to the admission of further aggravations of the horrors of war. It may be asked—How would the townsfolk know in any case if the requisite authority had been given? They would not know, but, in any case of wanton bombardment, representation could be made by their Government to the other belligerent, diplomatically, and the latter would either disavow his subordinate's action and promise to prevent recurrences, or else support it and give reasons. I suggest that the provision will make for humanity in air warfare.

It will probably be found necessary to add a provision to both the Naval Bombardment and the Geneva Conventions to ensure the distinctive signs of the protected buildings and establishments being visible from above; and a sign for night will also have to be considered. A suggestion was made at Geneva in 1906 that medical units should have special signs for night, but found no supporters. The aeroplane is still *un oiseau de jour*, as M. Clémentel described it in his French budget speech two years ago. But the dirigible is not; and dirigibles, which are specially adapted for bomb-dropping, on account of their greater carrying capacity and their power of hovering, are all the more likely to choose the night-time for their bombardments, because they will then be free from

attacks by aeroplanes.[1] "Night work at present," said Lieut. Colonel F. H. Sykes, Royal Flying Corps, in a recent lecture, "lies in the scope of the aeroplane which can for certain fly for 14 hours with two engines and fuel for this endurance." Before long, doubtless, there will be no such limitation to the capability of the aeroplane, and then one may expect to see nocturnal attacks entrusted to aeroplanes, too. The moral effect of a fire continued through the night was seen in Von Werder's bombardment of Strassburg in 1870.

The Hague Rule as to Espionage

The third of the Hague provisions—Article 29 of the *Règlement*—is one which cries aloud for amendment. The last sentence does not deal at all adequately with the question of air espionage. It dates from the Brussels Conference of forty years ago, when statesmen's minds were still agitated over Bismarck's treatment of the balloonists captured in attempting to escape from beleaguered Paris in 1870. It gives no positive ruling whatever as to espionage from balloons, though one would expect in an article on espionage which mentioned balloons to find some light and leading on the subject; and balloons have been used in war since 1794. It merely states that balloonists sent to carry despatches or to maintain communications are not spies; it does not say who *are*. It is only common

[1] The military correspondent of the French *Journal des Débats*, Commandant de Thomasson, stated, in a report on the last British Army Exercise, reproduced in the *Army Review* for January, 1914, that a biplane succeeded in rising above the Delta in six minutes and could have destroyed her easily in war.

sense to recognise that there can be spying from the air as well as from the land; in both cases it is the false pretence of the individual that constitutes the offence. If a civilian airman, allowing himself to be accepted in that character, observes a belligerent's movements and signals or reports them to the enemy, or if a military airman covers up his aircraft's service marks, with the same object, each is a spy. There is passive dissimulation in the former case, active in the latter.

The articles which deal with espionage in the codes of MM. Fauchille, d'Hooghe, and Le Moyne follow closely the wording of Article 29 of the *Règlement*. It seems to me undesirable to transfer the terms of that very unsatisfactory provision to air law. Even in its application to land espionage the Hague rule is lacking in precision. As the first sentence stands it does not cover the case of the civilian spy who enters the enemy's lines quite openly, and trusting to the openness and boldness of his action to disarm suspicion. That this is not an inconceivable occurrence, in the general confusion and frequent misunderstandings that accompany military operations, the experiences of many war correspondents prove. There is strictly no false pretence nor clandestine act in such a case. The second paragraph of the article is, apparently, an attempt to mend by expansion the faulty drafting of the first. It is objectionable, quite apart from its application to aviation, for in no practical circumstances can one imagine an intelligent soldier, sent with despatches through a region held by the enemy, "carrying out his mission openly," if those words are taken in their literal meaning. The whole

article might without loss be remodelled somewhat as follows :—

"Only persons collecting or attempting to collect information in the zone of a belligerent's operations with the intention of communicating it to the adverse party can be considered suspect of espionage: provided that enemy soldiers who have not disguised nor attempted to disguise their character as such shall not be so considered suspect."

The article proposed in my draft code—No. 8—contains a regulation on these lines for air spying.

I have followed M. Fauchille and the other writers in regarding as spies persons who collect information, not only in a belligerent's zone of operations, which is the rule in land war, but also above his territory, territorial waters, warships, and transports. The reason for the extension is obvious. I have inserted "aircraft" after "warships," etc., and have also added a paragraph to show that, though the *aircraft* may not be disguised, the *airman* may still be guilty of espionage ; for instance, a military airman might land, change his uniform for civilian clothes, and leave the aircraft, in order to collect information. The second-last and last paragraphs of my article are necessary to make the rules on the subject of air espionage complete and self-contained.

The Seizure of Enemy Civilian Aircraft

The fourth and last of the Hague references—Article 53 of the *Règlement*—is an instruction to land forces as to the manner in which aircraft found in an invaded country are to be dealt with. The principle

of temporary (precautionary) seizure, or sequestration, which it embodies, might fairly be extended to private aircraft of enemy nationality wherever encountered. This has been proposed in the draft code of M. Fauchille (see his Article 9), who has been followed by MM. D'Hooghe and Le Moyne, and, with one slight difference, by me.

M. Fauchille's original draft made private enemy aircraft liable to confiscation, like merchant-vessels at sea. The great majority of his colleagues in the Institute of International Law preferred to treat them like private property on land ; such property cannot be confiscated, but, under Article 53 of the Hague *Règlement*, may be seized if it is of a kind that can be put to warlike use, and kept during the war, but must be restored at the peace and the owners compensated. M. Fauchille's final draft embodies the "majority vote." The German jurist, Professor Meurer, had already suggested a similar rule in his book on aerial law (quoted by M. Fauchille), and Professor Kaufmann's view was the same, except that he would allow the seizing belligerent a choice between restoring the aircraft and paying an indemnity for it after the war. M. Fauchille held, rightly, that restoration should be the rule, as otherwise the belligerent would be tempted to use the aircraft for his operations and thus augment his military power at the expense of individuals. It may, however, happen that the seizing belligerent is unable to remove the private aircraft to safe custody, and as he cannot, in his own interests, leave it to be retaken by the enemy (who may, under his national laws, be empowered to requisition his subjects' aircraft for war), I think it is necessary to provide that

imperative military necessities may justify the destruction of the aircraft. (See Hague *Règlement*, Article 23 (g).)

In my draft article (No. 4), I propose that the seized private enemy aircraft should be restored without indemnity. This provision is taken from the *projet* Fauchille and is designed to emphasise the fact that only bare detention is legitimate. If compensation had to be paid to the enemy owners (as in Article 53 of the *Règlement*), a belligerent might be inclined to use the sequestrated aircraft and to justify his using them on the ground that the owners would be compensated for the wear and tear. Merchant-ships detained at the outbreak of hostilities are restored without indemnity. To empower a belligerent to seize and detain private enemy aircraft, in order that the other belligerent should not be able to make use of them, and then to allow him to use them himself, would be to mistake the purpose for which alone the seizure is authorised.

It is much to be desired that the Powers will be unanimous in accepting the principle of M. Fauchille's draft article. The definitive capture of private property at sea has been the object of many criticisms and attacks in these later years, and it would be a thousand pities if it were extended to the domain of the air. There seems to be no reason why M. Fauchille's compromise should not be agreed to. While aircraft are, of their nature, too useful for warlike purposes to be allowed to remain at the enemy's disposal, their commercial importance in international traffic is not likely to be sufficiently great to make it worth a belligerent's while, for many years to come,

to intimidate air-shippers and to stop air trade (as he does sea trade) by the threat of confiscation of vessel and cargo, with the intention of injuring the enemy State in pocket and credit. Temporary detention of private enemy aircraft is all that is necessary to protect a belligerent's military interests.

III

THE CODES PROPOSED BY M. FAUCHILLE AND OTHERS

Projected Codes for Aerial War

Except for the four references, just quoted, in the Hague legislation, aerial warfare remains in the domain of the "law of nations," that is, its conduct is governed by the principles, undefined in many respects yet generally recognised, of International Law, just as the conduct of land war was before the Hague *Règlement* of 1899. A code for air warfare will no doubt be discussed at the next Hague Conference. Meanwhile, the rules which are to be followed can only be ascertained from a study of the views of jurists as expressed in the considerable literature which already exists on the subject, and from the practice followed in any wars in which aircraft have been used: the latter, as yet, a negligible source of information. Various codes have been drafted, the most comprehensive being that presented by M. Paul Fauchille to the Institute of International Law at its Madrid Session in 1911. This draft is particularly useful and important, because, before submitting it to the Institute, M. Fauchille invited the remarks thereon of some of his colleagues, and either embodied the view expressed

by the latter in his final draft, or, where he retained articles with which the other jurists disagreed, detailed the reason for not accepting their suggestions in the commentary which accompanied the draft code. Other codes which have been proposed are those of MM. d'Hooghe, Von Bar, Le Moyne, and Philit.

These, although they differ in many respects from M. Fauchille's *projet*, have been largely built on his groundwork: he has been the pioneer in this field of study. I give the codes of MM. Fauchille, Von Bar and Le Moyne in appendices to this book, adding, in the case of M. Fauchille's code, which is full of cross-references, extracts from the Conventions to which he refers in each article. M. d'Hooghe's code is practically identical with M. Fauchille's, and I have indicated, in another appendix, the few points in which the two codes differ. M. d'Hooghe is president of the *Comité juridique international de l'aviation.* I have not given M. Philit's code; it is of less importance than the others. There are many useful suggestions in his book, but some of his rules, and especially his idea of establishing "protective zones," of 1500 metres generally and, in some circumstances, of 10,000 metres (a quite impossible altitude for aeroplanes, the height record of which is only a little over 20,000 feet), appear to me to be quite unrealisable. Further material for the codification of air law will be found in the works of Dr. H. D. Hazeltine and M. Bellenger (both excellent books), M. Catellani (M. Bouteloup's translation), Baron de Staël-Holstein, in the proceedings of the Institute of International Law at the Madrid session of 1911 (Vol. 24 of the *Annuaires* of the Institute), in the Report of the International Law

Association for 1913 (published 1914) and in the numbers of the *Revue de la Locomotion aérienne* from its beginning in 1910 to date. The articles by M. Jenny-Lycklama in the latter (see the nos. for September, October, and November 1910) appear to me to be the finest work yet done in the literature of aerial law.

The Madrid Debate of 1911.

M. Fauchille's *projet*, though prepared for the Institute of International Law, was not put to the vote at the Madrid Session. Instead, the first two Articles of Herr von Bar's draft code were submitted but were rejected, the Institute contenting itself with adopting the following somewhat unsatisfactory generality :

"Aerial war is permitted, but only on the proviso that it does not entail greater danger to the persons or property of the peaceful population than land or maritime war."

The discussion at the Conference was concerned rather with the general principles of aerial war than with detailed rules. Profound differences of view were disclosed. Some of the delegates, like Professor Holland and M. Maluquer, proposed to ban the employment of aircraft, for any purpose whatever, in war. Others, like Professor Westlake and M. Albéric Rolin, would allow their use for reconnaissance but not for purposes of attack. A third group—the greatest one—regretfully admitted the legitimacy of the use of aircraft for either scouting or fighting. "If the employment of aircraft as a means of war is to be

proscribed," said M. Edouard Rolin, one of the last group, "it must first be shown that they are, as engines of war, unnecessarily cruel; failing this being established, it must be admitted that aerial war is permissible." One has to regret that M. E. Rolin's colleagues did not accept his common-sense view and that they wasted their time, if one may speak so disrespectfully, in debating academic generalities, when they might have been usefully discussing the details of M. Fauchille's draft code.

Shortcomings of M. Fauchille's Code

To say that M. Fauchille's code is valuable is merely to repeat that it is by M. Fauchille. But it is open to the objection which Professor Renault (another eminent authority) raised in 1911, that it is too comprehensive and out of proportion to the existing state of aerial navigation. (A similar objection was raised by Professor Meurer of Wurzburg.) There is some force in M. Fauchille's reply that, even if the conditions which he presumes are still hypothetical and not actual, it is proper for an exclusively scientific body like the Institute of International Law to "discount the future" by framing regulations to meet possibilities. But such a view must necessarily vitiate one's conclusions. In everything relating to the laws of war, it is of paramount importance to give weight to "military necessities," and "military necessities" cannot be gauged unless the capabilities and limitations of any arm or warlike vehicle are kept in view. Nothing should be done to add strength to the opinion sometimes held of International Law that it is too

theoretical, too ideal, to be of much practical consequence in the clash of arms.

When M. Fauchille's draft was made, the science of flight was even more undeveloped than it is to-day. He rightly anticipated a rapid progress in its development, but in doing so, as it appears to me, he formulated rules for conditions which, for many years at least, if ever, are hardly likely to exist. His rules therefore are in some respects rather unpractical. For instance he gives rules regarding the immunity of aircraft engaged in scientific and philanthropic missions and the conveyance of sick and wounded. Such questions may well be left to be settled until the practice which they regulate exists.

The Proposed Codes and Contraband

Some of the other questions with which M. Fauchille and the other writers on aerial war have concerned themselves appear to me to be not, as yet, "practical politics." Chief of these questions is that of contraband of war. One of the most difficult and important chapters of maritime law is concerned with the carriage of contraband; but its difficulties and its importance arise from causes which will not affect air contraband. Where every ounce of weight is of moment, one need not anticipate any carriage of "conditional contraband" beyond what may be dealt with on the principle *de minimis non curat lex*; and it is the undefined and varying nature of "conditional contraband" that is responsible for many of the complexities in cases of sea contraband. Any questions of air contraband will, I think, be confined to cases of carriage of

small quantities of bombs and high explosives, and of despatches and enemy military persons (corresponding to W. E. Hall's "Analogues of Contraband" at sea). They will, therefore, be cases rather of hostile assistance, rendered either with actual intent to injure, or with that want of reasonable care which amounts to hostile intent, and they will be preventable and punishable as such rather than under the uncertain rules which apply to sea contraband. From the very nature of aviation, belligerents will have to take a sterner view of what constitutes hostile assistance by aircraft than they have taken in the past in the case of non-military vessels at sea.

Blockade Breaking

For similar reasons I think one need not legislate for questions of blockade running. No doubt cases will occur of aircraft trying to leave or enter blockaded or besieged towns; but they can be met more easily and effectively than by applying the rather cumbrous rules which govern blockade breaking at sea. All that is necessary is to provide (and the provision is needed quite apart from its bearing on blockade, as I will try to show later on), that if urgent military necessity demands, civilian aircraft can be shelled without warning; and, further, that such aircraft are liable, on capture, to be confiscated if they approach a zone of operations on land or sea, or circulate near a belligerent's land, naval, or aerial forces, or his works, garrisons, forts or other defences, or his depots. As to the former of these two suggested provisions, MM. Fauchille, Le Moyne and d'Hooghe would only allow

the destruction of private aircraft after a prior summons. I cannot think that such a rule will prove acceptable to military or naval commanders if laid down as rigid and unconditional. Cases are bound to occur in which a summons or warning could not be given without the belligerent who has to give it risking the sacrifice of his military interests. If, for example, a private enemy or neutral aircraft attempts to enter a blockaded port or a besieged town, appearing suddenly out of the clouds, as an aeroplane may, the blockading or besieging troops might lose their only chance of stopping the aircraft (which may carry important despatches or a selected commander to organise the defence) in the few precious moments which would elapse between the giving of the summons and the aircraft's refusal to comply therewith. The only practical course is to recognise that military necessity may justify private or neutral aircraft being shelled out of hand. But seeing that airmen may be inclined to discount such a commonplace sporting risk as the chance of annihilation, I suggest that to the sanction of shell-fire be added the sanction of loss of their property on capture, if they approach a zone of operations or troops, forts, etc. Some really powerful and deterrent sanction is needed. An incident of the Russo-Japanese war serves to illustrate the view which belligerents may be expected to take as regards such a menace to the secrecy of their operations as the approach of irresponsible civilian aircraft. In that war the steamer *Haimum*, fitted with wireless telegraphy, was sent by a London newspaper to follow the operations of the fleets in Chinese waters. The Russians threatened to treat the pressmen on board as spies and to make the vessel a prize of war.

This pretension went too far, but undoubtedly a commander has a right to prevent, by attaching sufficient penalties to the commission of the act, the entering of his zone of operations by a vessel which has peculiar facilities for transmitting information. Aircraft, even without wireless installations, have such facilities in the speed and the altitude at which they can move, and commanders will need wide and drastic powers to cope with aerial *Haimums* in the wars of the future.

Neutral or Enemy Character

Rules for determining the question of the acquisition of neutral character by enemy aircraft also appear to me hardly necessary. The question has not the importance of the parallel one which arises in maritime law, for, enemy property being confiscable in sea war but only sequestrable (it is suggested) in aerial, there is less motive for simulating neutral character in the case of aircraft. Again sea voyages are long and a ship may change ownership, and therewith the flag it flies, during a voyage; and "visit" is always possible at sea. The voyages of aircraft are brief, their marks of nationality will probably be fixed, and "visit" is impracticable; all that is possible is to command the suspected aircraft to land and this is only feasible in the territory of the belligerent stopping the aircraft or in hostile territory occupied by his troops—both of which places aircraft of doubtful character and antecedents (*i.e.*, aircraft whose assumption of neutral character is not *bonâ fide*) would be especially careful to avoid.

Rules regarding Civilian Aircraft in the Proposed Codes

It is questionable, indeed, whether the writers who have proposed rules for aerial war have entirely grasped the real inner meaning and character of this new development of the art of war. They seem, in their treatment of some questions, not to recognise fully enough that the new weapon is a thing apart, absolutely *sui generis*, unlike anything that has yet been concerned in war on land or sea. The coming of the aircraft, with its extraordinary speed, its power of unmolested observation, its unique capacity for avoiding capture, has opened a new series of problems in the laws of war. All the suggested codes, useful as they are, seem to fail to the extent that they do not distinguish between aircraft as "dead" property and aircraft as the potent, almost functional, agency of observation and communication which it is always capable of becoming. Within certain strict limits, it is right and reasonable to assimilate aircraft to different kinds of existing property—to that private enemy property, for instance, which, though immune from confiscation, may be sequestrated by a belligerent to prevent his enemy from using it, or to that neutral property with which alone belligerents have much concern—neutral merchant-ships plying their trade. But these analogies must not be pressed too far. The extraordinary and unique powers of this new kind of "property" ("property" with a touch of black magic added) must never be lost sight of, in determining the rights and liabilities of civilian airmen. One has only to consider how history might have been changed if

only someone had anticipated Lilienthal, Chanute, the Wrights and the other pioneers by a century. It might have altered the fate of Waterloo, by keeping Napoleon and Grouchy in touch and placing the latter where he was meant to be, across Blücher's path from Wavre; or of Chancellorsville, by warning Hooker that Jackson was moving on his flank; or of Sedan, by saving MacMahon from running his head into that great trap on the Meuse. A thing which is capable of changing the face of war like this cannot be classed absolutely with private stores of blasting powder on land, or with tramp steamers at sea. One is amazed to find M. Le Moyne stating that an aircraft is, in the eyes of International Law, simply a munition of war, like a mitrailleuse, a cannon, or a rifle.

It is something far more, to the precise extent that it is an aircraft and they are not. The non-military aircraft is indeed a thing which commanders will be entitled, in self-protection, to ban and to keep at bay as they would the cholera or plague, and the action which they take to that end, if it is to be effective, cannot be subject to review by prize-courts, or fettered by the nice rules and distinctions which constitute the law of contraband. It may be a pity that this should be so, and perhaps it would be preferable, on general considerations, if the young science of flight could be "neutralised" in war; but to expect that military and naval commanders will, because of general considerations, allow aircraft any latitude that may redound to their disadvantage is to expect Utopia. When aircraft have established their place in the world's commerce, when their importance as international carriers approaches that of sea-going

vessels, when they carry mixed cargoes and represent in their trade great international interests, and, above all, when there is some sharper line between aircraft of a commercial character and aircraft of a warlike character than there is to-day, it will be time to consider whether the rules regarding contraband, unneutral service, prize court, etc.,[1] cannot be applied to them. But at present, it is impossible, I submit, to subject them to any milder rules than those proposed in my draft code. There is in them too great a potential capacity for hostile acts, or, if one likes, for acts of damaging indiscretion, to allow them to be regarded as otherwise than always suspect in the eyes of military commanders, as things which, like the Red Indians long ago in America, it is pretty safe to shoot on sight. This view may appear drastic and inhumane ; but is any other view practical? The alternative appears to me to be one of double choice—either to abolish aviation or to abolish war.

Requisitioned Civilian Aircraft

It is suggested, then, that in very many cases the rights of private airmen, belligerent and neutral, to security and freedom from interference and molesta-

[1] If the rule be adopted that private enemy aircraft are subject to sequestration only and not to definitive capture, there will not be the same necessity for establishing prize courts for aircraft cases as there is for shipping. As regards neutral aircraft, these will ordinarily only be condemned (as indeed will be private enemy aircraft also) in respect of acts of which the capturing belligerent must, for military reasons, be the sole and sufficient judge. The difference between the conditions of air and sea traffic will justify belligerents in demanding, in the case of aircraft, that they shall have the right to act without regard to those safeguards of judgment and appeal which are found necessary in maritime cases.

tion, must in war time practically disappear. From the very nature of the vehicle which they use, they cannot expect anything but rough handling if they venture into places in which the swift-smiting law of war runs. Military exigencies cannot allow the civilian airman whose services and machine are requisitioned by troops, for conveying a staff-officer or carrying explosives, to be classed with the civilian carter whose wagon is requisitioned for some service of the same kind. In equity, perhaps, the one deserves no worse treatment than the other; but, in practice, the greater danger to the enemy which lies in the airman's employment, his removal from control, his wider power of movement and observation, justify the airman's being treated as that outlaw of war law—the unqualified belligerent—if he engages in any service whatever connected with hostilities; whereas the carter is, at the most, only made a prisoner of war. (Usually, he is allowed to go free.) If this is hard on private airmen, they should refuse to engage on such duties unless their machines are taken over by the military authorities and given the service marks, in fact, turned into regular military aircraft; the airmen themselves could be commissioned or enlisted for the time and supplied with uniform.[1] Otherwise, as it seems to

[1] Such men will not have been previously under military discipline, but neither will certain kinds of reservists, about whose qualifications as belligerents there can be no question, provided they wear uniform, are under discipline when mobilised, and obey the laws of war. In Great Britain civilian mechanics with experience in aeroplane work, wireless telegraphy, and motor transport driving, are enlisted as "Special Reservists, Category (C)"; they peform no duties in peace, but receive a bounty of £4 a year as a "retainer" for their services in war. When the Reserve is mobilised they receive free uniform, rations, etc., and are paid as Air Mechanics of the Royal Flying Corps. If qualified pilots, they would be employed as such in war. There is a similar Reserve of flying

me, they will have to be regarded as unqualified combatants.

Civilian Aircraft and Zones of Operations

Similarly, if a civilian airman approaches the scene of any operations, though his intentions be no more warlike than those of the average Cook's tourist, military exigencies will demand that he should be dealt with in such a manner that others (whose intentions may not be so good) shall be deterred from following his example. Hence my suggestions that he should be made liable to having his aircraft confiscated and also to the risk of being summarily shelled. Although this latter risk is not admitted by M. Fauchille

officers, called the "Second Reserve of the R.F.C.," who perform no tests or duties and receive no pay or gratuities, during peace, but undertake to serve, if required, with the R.F.C. in war. The position of the officers and men of these two Reserves is practically the same as that of the civilian airman referred to in the text, except that they are already formally commissioned and attested respectively.

Besides these purely civilian Reserves, there are the "First Reserve of the R.F.C." for officers, and the ordinary Special Reserve for non-commissioned ranks. They differ from the Reserves just mentioned in that they are called up for training during peace and the members do not don uniform for the first time only when war begins and mobilisation is ordered. The officers of the First Reserve are attached for instruction to the Central Flying School on first appointment, receiving army pay, and thereafter perform quarterly flying tests, receiving an annual gratuity of £50. They are given an "Outfit Allowance" to provide themselves with uniform. The Warrant officers, N.C.O.'s, and men of the ordinary Special Reserve may be either soldiers serving in other arms of the service, or else Army Reservists (*i.e.*, men who have served for a few years with the colours and have been transferred for their remaining period of service to the Reserve), or Special Reservists (the successors of the *quondam* militiamen). They receive instruction at the Central Flying School on enlistment, being paid as soldiers of the R.F.C., and afterwards perform quarterly tests. They receive annual bounties of £10, if serving with the colours, or £20 if serving in the Army Reserve or Special Reserve. They wear uniform (supplied free) when doing duty. (*Army Orders* 131/1912 and 229/1913.)

and the other writers, they appear to be reaching forward towards a somewhat similar conception of the private airman's disabilities in war. They forbid all circulation of neutral aircraft in a belligerent's atmosphere. Since military operations rarely affect the whole extent of a territory, to forbid neutral aircraft to circulate in belligerent atmosphere would be, as the French Professor Renault and the German Professors Von Bar and Kaufman point out, the cause of grave and unnecessary prejudice to neutrals, who would thus be shut out from commerce with the warring Sates ; and, adds M. Bellenger, if private belligerent aircraft are still allowed to enter neutral atmosphere, the prejudice would be aggravated by the creation of a kind of monopoly in war time in favour of belligerent airmen. I might add a further, and perhaps more practical, objection, namely, that under these writers' rules a theatre of land operations would not be kept clear of enemy civilian airmen, nor a theatre of sea operations of either enemy or neutral airman, so that the object which they have in view is only partially attained. Apart from these objections to the general prohibition of neutral circulation in belligerent atmosphere—objections which (except the last) might themselves be criticised as based on an air commerce which does not yet exist—the view of MM. Fauchille, d'Hooghe and Le Moyne appears to be unsustainable as a rule of International law. It rests with each country to decide whether its frontiers shall be closed or not to airmen in war as in peace. The question is one of internal sovereignty, not of International Law. Any State has an incontestable right (given the sovereignty of air spaces) to prohibit the crossing of its frontiers by air-

craft and to assign penalties—whether in the form of fines, imprisonment, or confiscation of the aircraft—for violation of its laws on the subject. But such penalties are not imposed or authorised by International Law—they are imposed on the authority of the State's territorial sovereignty. Where International Law comes in is in authorising a belligerent to take such steps as will ensure his military operations not being hampered by the action of neutrals. It authorises him, for instance, to assume a power, not his in peace, to prevent neutrals from carrying munitions of war to the enemy, or breaking a blockade, or assisting the enemy generally with supplies and stores; and it will similarly empower him, in the case of aircraft, to strike directly at neutrals whose coming or presence might endanger the success of his operations. To proclaim a general rule of International Law that every neutral State's frontiers must be closed to *private* airmen from the moment war begins would be to apply to aerial war a rule that goes beyond any rule in land or naval war, It is clearly unwise to make a neutral State's responsibilities, as regards the nationals' actions, greatest in the one domain in which effective control is most difficult. It is different, of course, with neutral *military* aircraft; they are, so to speak, "emanations" of their State, they are manned and controlled under its authority, and the State is responsible for their movements and actions. Their entering belligerent atmosphere is therefore a governmental act, *i.e.*, one which affects their State's neutrality.

The interests of civilian airmen and of belligerents might be reconciled by the suggestion which has been made, that all civilian aircraft flying over a belligerent's

territory, whether they belong to the belligerent's own subjects or to neutrals, will be declared liable to be fired upon unless they carry out certain definite movements which would probably be kept confidential.[1] There may be some difficulty about notifying and keeping secret the exact manœuvre which will be prescribed and which will be taken as evidence of the friendly character of the aircraft, but the suggestion is worthy of careful consideration in view of the admitted difficulty of identifying aeroplanes at a height of 3,000 to 4,000 feet and over. The provision in my draft code (see Article 7) that civilian aircraft can be fired upon without warning in cases of imperative military necessity would mean, in practice, that they would always be liable to be shelled if they approached a belligerent's troops or forts (and naturally they could not be fired upon elsewhere), and, if the suggestion were adopted, some regrettable cases of misunderstanding might be avoided. Any rules as to the treatment of private aircraft belonging to a belligerent's own nationals are, of course, questions to be dealt with in the national law of the belligerent, not in an international code.

[1] For the information that such a suggestion has been made (and, indeed, put into practice), I am indebted to Captain W. D. Beatty, R. F. Corps.

IV

THE SOVEREIGNTY OR FREEDOM OF THE AIR

Aerial Sovereignty and International Conferences

THE sovereignty or freedom of the air has been a vexed question among jurists since the first. It was discussed at the Madrid session of the Institute of International Law in 1911 and the Institute then voted the following text :

" International aerial circulation is free, subject to the right of the underlying States to take certain steps, which should be fixed, to safeguard their own security and that of the persons and property of their inhabitants."

Before this, in 1910, a conference of diplomatists had been held at Paris, under the presidency of M. Millerand, Minister of Public Works, and one of the questions discussed was whether the territorial dominion of States extends to the air space above. Numerous sessions were held in May and June of that year, but the conference broke up without issuing any report. Official confirmation is lacking, but there is reason to believe that the rupture was due to the attitude taken up by certain Powers, including Great Britain and

Germany, relative to the *status* of the air. These Powers, it is stated, claimed an absolute sovereignty over the air and the right to close their aerial frontiers at any time to foreign aircraft, without having to justify their action.

The question was also discussed by the International Law Association in 1913, in which year it met at Madrid, as the Institute (a quite distinct society) had done two years before. Unanimity was not reached, but eventually a formula was found which went far to reconcile the opposing views. This formula, while recognising the sovereignty of subjacent States over the atmosphere, expresses the view that such States *ought* to allow liberty of passage to the aircraft of other nations. "An examination of recent discussions," says the report of the Committee of the Association, "has convinced us that the opinion of statesmen and jurists is more and more coming to accept the view of full sovereignty. Legislation in those countries where legislation has taken place is based on the principle of full sovereignty . . . But they (the Committee) are of opinion that, subject to such safeguards as subjacent States may think it right to impose, aerial navigation should be permitted as a matter of comity." The rules proposed by the Institute and by the Association are given in Appendix V.

The Freedom of the Air

The principle of the freedom of the air is one which has in it a broad appeal to acceptance. There is something which attracts in the conception of *l'air sans maître*, to use a French writer's phrase—the air

that is as free as the winds of heaven. Many jurists have lent powerful support to the doctrine of freedom. The air, they say, is fluid and everchanging, like the sea, and, like it, insusceptible of appropriation. "You cannot close the infinite," says M. Henry-Coüannier ;[1] "you cannot, on the ocean of the clouds, write up the notice—'No passage here.'" "Territory is primarily for habitation and national exploitation," says M. d'Hooghe,[2] "and only secondarily for international circulation ; the sea and the air, on the other hand, are unfitted for habitation and exploitation and are only meant to circulate in."

The Sovereignty of the Air

It is a fallacy to view the air solely as an *element* and not as a *space*, and a space which may be used by smugglers in peace and by spies and invaders in war. The doctrine of the freedom of the air is, indeed, unless formulated with reservations which make it not a doctrine of freedom at all, incompatible with the doctrine of the right to national self-preservation. The alternative principle which would assign to each country the sovereignty of the atmosphere above its territory is the principle which has, in fact, prevailed in practical legislation. Baron de Staël-Holstein, in a paper entitled "L'Empire sur l'Air" in the *Revue de la Locomotion aérienne* (October, 1912), appears to lay upon Great Britain the blame of being responsible for fettering free aerial travel by advancing the principle of the sovereignty of the air, and describes *la conception*

[1] *Revue de la loc. aér.*, January, 1911.
[2] *Droit aérien* (Paris, Dupont), p. 7.

brittanique as *démodée*.[1] But the principle is not confined to British legislation. Article 32 of the French *Décret* of 13 December, 1913, reads: "The circulation in France of foreign military aircraft is forbidden."[2]

The British Aerial Navigation Act of 1913 gives the Government power to prohibit the navigation of aircraft over "the whole or any part of the coastline of the United Kingdom and the territorial waters adjacent thereto."[3] In other words, Great Britain asserts her right to close her atmosphere absolutely to the aircraft of other States, *i.e.*, she proclaims her sovereignty to the atmosphere overlying Great Britain. No amount of argument can make the effect of the Act other than that. "The English Aerial Navigation Acts, 1911 and 1913, assume full sovereignty rights,

[1] See also Baron de Staël-Holstein's *La Réglementation de la Guerre des Airs* (La Haye, 1911), pp. 64–8.

[2] Compare *Statutory Rule and Order*, No. 228, 1913 (Home Office), issued under the British Aerial Navigation Acts, 1911 and 1913, which provides that: "Foreign naval or military aircraft shall not pass over or land within any part of the United Kingdom or the territorial waters thereof except on the express invitation, or with the express permission, previously obtained, of H.M. Government."

[3] The power has been exercised in the *Statutory Rule and Order* referred to in the last note, which closes the whole coastline of the United Kingdom to foreign aircraft, with the exception of certain portions which are specified in Schedule II. of the *Order* and are further indicated in a map accompanying the *Order*. These excepted portions are tracts of about 45 miles in Aberdeen; of about 40 miles in Northumberland (East Coast); of about 70 miles round the Wash (Lincoln and Norfolk); of 12 or 15 miles in Essex, near Burnham-on-Crouch; of about 20 miles from Margate to Walmer in Kent; of about 23 miles from Rye to Eastbourne, and of about the same distance between Hove and Bognor, in Sussex; and, finally, of about 35 miles in Dorset and Devon, between Bridport and Dawlish. All foreign aircraft desiring to circulate over Great Britain must land, on first entry, in one of these areas, within five geographical miles of the coast, and make an "arrival report" to the authorities.

and recent legislation in France and Russia rests on the same assumption: while the Franco-German Convention regulating air traffic, which is stated in the Press to have been recently concluded, admits the same principle in 'authorising' civil aerial circulation in each country subject to certain conditions, and in allowing to each country the right of making such regulations as it pleases relative thereto."[1] Nor is there wanting the support of jurists to the view which proclaims the air capable of national appropriation. "Whether the matter be treated as one of legal principle or as one of practice," says Professor Sir H. Erle Richards,[2] "it is alike necessary to recognise the absolute sovereignty of States in the air space above their territories." "Between a territory and the air dominating it," says Professor Arnaldo de Valles, of Verona,[3] "there is a connection so close that it is impossible to separate the one from the other." "If the freedom of the sea is desirable for all," says M. Jenny Lycklama,[4] "the reason for this must be sought in the fact that no individual State has any interest in ruling over a distant part of the sea, and, on the contrary, has an interest in the freedom of international maritime circulation. . . . A State has more interest in having power in the air space over its territory than in the portion of the sea washing its shores." For practical purposes the doctrine of the freedom of the air is dead. "Liberty of aerial circulation," says M.

[1] Report of the Committee upon Aviation of the International Law Association (see the Association's Report of the Madrid Session of 1913 (London, Flint), page 532). The Franco-German agreement is given in Appendix X.

[2] *Sovereignty over the Air* (Oxford, 1912), p. 25.

[3] *Revue de la loc. aér.*, July-August, 1910.

[4] *Revue de la loc. aér.*, Sept., 1910.

Bellenger,[1] "is a generous dream but a dream entailing such consequences for the security of States that it is absolutely impossible to admit it." "The doctrine of the freedom of the air—even limited by the State's so-called right of conservation—lacks historical and juristic soundness," says Dr. Hazeltine;[2] "it rests on no solid rock of past development and on no solid rock of consistent principle. . . . It should not be forgotten that the history of national law shows us the limitation of private property rights in various directions, and that the history of international law has been the history of voluntary limitation of their rights by Sovereign States in the interest of the whole society of States including themselves. In international law the progress has therefore been from national to international law; and this progress has largely been effected by international agreement. The same progress will probably be witnessed in the growth of a law of the air."

Qualified Sovereignty Insufficient

It may be argued that there can be no strong practical objection to admitting the freedom of the air if one qualifies the admission by recognising the right of the different States to take all the measures necessary for their security. But this is not so. It is very important to lay down the principle of absolute sovereignty to assert the inalienable right of States to open or close their aerial frontiers as they choose. Nothing less will suffice. Qualified sovereignty is not sove-

[1] *La Guerre aérienne* (Paris, Pedone, 1912), p. 36.
[2] *The Law of the Air* (1911), pp. 142–3.

reignty at all. A State must have the same power in the air above its territory as in the territory below. When aircraft are in question, with their mobility, their speed, their freedom from control, it is especially necessary for a State to maintain its right to exclude or admit as it thinks fit such potentially dangerous visitors from beyond its frontiers.

It has been suggested that sovereignty with a servitude of innocent passage will meet the difficulty. The same objection applies. Unless the servitude is so restricted and made subject to such conditions that it amounts in reality to each separate case of entry being considered on its merits, *i.e.*, in effect, unless one makes the qualified sovereignty equivalent to unconditional sovereignty, the proposal is incompatible with that full right of national self-preservation which States will demand.

Proposed Territorial Zone for the Air

Sovereignty limited to a certain height has been suggested by many authors. The height proposed has been variously taken as the range of vision, or of cannon, or the height of the highest mountain or building in a particular country, or a purely arbitrary height; and it has been suggested that underlying States should have dominion over the volume of air below the limit referred to and that the upper reaches of the air should be free. The writers in question would, in fact, treat the air like the sea, and institute a territorial air zone, corresponding to the territorial or coastal waters of States.

The comparison is fallacious. The proper parallel

for a world composed of States holding sovereignty over the air up to a certain height would be, not the world as we know it—the world of men and women as it exists—but a subaqueous world of mermen and mermaids "protected" by a territorial zone of so many fathoms of sea water above their heads. The reason that States claim territorial sovereignty over the sea for a marine league from their shores is simply that such a protecting zone is necessary for their security. A similar zone, horizontal instead of vertical, would give no corresponding security from molestation from the air. Ordinarily anything happening outside the limit of the territorial waters would not affect persons and property on the land. It is obviously not so in the case of the air ; occurrences in the upper reaches of the air, at whatever height, might make their effects felt on the ground, just as much as occurrences at lower altitudes. The line of demarcation would be far more difficult to observe in the air, and transit from the free zone to the closed zone would be more easily and rapidly effected, would be more dependent on chance, and would affect more than the mere sea-front of the State concerned.

The Air as a res communis

The communistic suggestion of M. d'Hooghe is quite chimerical and impracticable. He proposes that the atmosphere should be considered as a *res communis*, that all of it should be regarded as the property of *all* the States together, that no one of them should have the power to legislate, separately, for the air space above its own territory, and that only the whole body

of States, in agreement, should be entitled to make rules for the domain of which all are joint sovereigns. One wonders what States would have a place in this proposed "parliament of man." Would Hayti, for instance? And how could agreement be reached by countries differing in their customs regulations, in their immigration laws, and in many other things? The proposal cuts across the very first requirement of practical statesmen in this matter of the *régime* of the air, namely, the right of exclusive national action as regards self-protection.

V

BELLIGERENT ENTRY OF NEUTRAL ATMOSPHERE

Belligerent Passage of Neutral Territory

If the sovereignty of air spaces is granted, the right of belligerent entry of neutral atmosphere cannot logically be maintained. The neutral State which grants passage to a belligerent *escadrille* is thereby allowing the use of its domain for a purpose of hostilities. If the soil of a country and the air above are so intimately bound together that States must, as they do, claim sovereignty over both, the connection cannot be dissevered to suit the convenience of a belligerent whose enemy lies behind a neutral State's borders. There must be sovereignty for all purposes or for none.

M. Fauchille, though an upholder of the freedom of the air, is apparently of opinion that something more than a general principle is required to support the right of belligerent passage, and he advances the strange argument that, if such passage be not allowed, the aircraft of a belligerent State which is separated from the other belligerent State by a neutral country and which has no sea frontage, would be unable to reach their enemy. But this is precisely the situation

as regards land passage by troops and no divine right of belligerency has been claimed in recent times to justify passage for them. If Austria and France were at war, for instance, and if Italy, Switzerland, and Germany were neutral, and if flying be left for the moment out of the question, no Austrian soldier could set foot in France, nor any French soldier in Austria, unless the one or the other travelled by sea.

The same objection to belligerent passage arises in land and in aerial war. If passage is granted, it must be granted impartially ; hence, the troops or aircraft of the two belligerent parties may come into collision in neutral territory or atmosphere and the neutral State may suffer. The most extreme partisans of the liberty of the air would not countenance the claim of belligerents to engage in actual hostilities above neutral soil.

Belligerent Aircraft and Neutral Ports.

The case of entry of neutral ports is a little different ; there, collisions between opposing aircraft could be prevented in the same manner as collisions between opposing battleships. It has been sought to justify entry of neutral ports on the analogy of maritime law, which allows entry, with certain restrictions and upon certain conditions, to belligerent warships. M. Lycklama is an advocate of such a privilege, and one might, with him, distinguish between, on one side, the ports and territorial waters of neutrals, and their territory generally, on the other, and forbid entry of the latter but allow it of the former, on the ground that, as the atmosphere above the open sea is free, while that over the land is the domain of the subjacent State, aircraft

whose ordinary path is over the sea and who touch at a neutral's ports for some reason or other are only departing for a little from the space where they have a right to travel, and should not be denied that asylum which aircraft which have put themselves "out of court" by travelling overland (*i.e.*, in a space to which they have no right of access) cannot claim with as good reason. But there are practical difficulties in applying such a rule. For instance, if Spain and Italy were at war, and an Italian aeroplane landed at Marseilles, *i.e.*, a neutral port, how could the local authorities tell whether it had come by sea along the Riviera coast from Genoa, or overland from Turin?

Impossibility of Differentiating between Land and Seaplanes.

It is no solution of the difficulty to reply that a distinction can be made between land aeroplanes and seaplanes and that entry can be granted to the latter but refused to the former. For a land type of aeroplane may be used for a sea journey, and ordinary aeroplanes can be carried on and launched from ships' decks. Furthermore, how would one deal with the "amphibians," *i.e.*, the aeroplanes which are fitted with both landing wheels and floats and can alight on and ascend from either land or water? The Albatross and the Caudron waterplanes are examples. Even aeroplanes which have not the double purpose fitments can in many cases be changed easily from floats to landing chassis and *vice versâ*; for example, the Blériot waterplane and the "F.B.A. flying boat."

The entry of neutral ports by belligerent warships

is simply a vested right of belligerency which is consecrated by tradition and indefensible on its merits. It is wholly wrong in principle and is, furthermore, the cause of very considerable inconvenience to neutrals.

Dr. H. D. Hazeltine, who holds that the same privilege of entry of neutral harbours should be granted to air vessels as to sea vessels, admits the possibility of such inconvenience. "Undoubtedly," he says,[1] "difficulties would arise in carrying out this principle ; and the matter will require the most serious attention of international lawyers. It will be necessary, for example, definitely to determine how long the air vessel should remain in the neutral port, and it will be necessary to ensure the strict observance of impartiality on the part of the neutral state itself."

The difficulties to which Dr. Hazeltine refers will, I think, be such that a great balance of advantages will be found to lie on the side of refusing admission of entry to belligerent aircraft, except in one single case, to which I shall refer presently. The history of sea warfare in modern times is largely concerned with troublesome questions arising solely out of a law of neutrality which began as a concession and a privilege and was stretched till it became not only a right, but a right that grievously imperils neutrality itself. The record of the origin of the rule that a belligerent warship may only remain twenty-four hours in a neutral port is one of the most amusing and instructive chapters of International Law. It is of interest in this connection as showing how belligerency may turn a law of neutrality to further its own hostile ends.

[1] *The Law of the Air* (1911), p. 140.

There was an old law of neutrality, dating from at least 1759, which prescribed an interval of at least twenty-four hours between the departure of warships belonging to both belligerent parties from a neutral port. This rule was cleverly made use of in 1861 by the Federal cruiser "Tuscarora" to imprison the Confederate cruiser "Nashville" in Southampton Water. The "Tuscarora," keeping steam up and slips in her cables, claimed priority of sailing whenever she saw the "Nashville" move; then she would return within twenty-four hours, and, by repeating the same trick, succeeded in confining the "Nashville" to the neutral harbour for a considerable time. To prevent a recurrence of such a Gilbertian situation, the British Government adopted the rule that a belligerent war-vessel can only remain for twenty-four hours in a neutral port, except in the case of stress of weather or reprovisioning. It is quite possible that incidents of the same kind may arise if the principle of belligerent entry be adopted for aircraft.

Beyond allowing seaplanes attached to a fleet, or other aeroplanes actually operating therewith, to enter and remain in neutral waters if and so long as they remain in actual contact with their "parent" ships, no entry whatever should be allowed to aircraft; or, rather, if they enter, they should be secured and interned while hostilities last. The exception referred to will probably be found advisable for reasons of practical policy, but, with this one exception, there is no sound reason whatever for extending to aircraft the anomaly and anachronism with which the general law of neutrality is disfigured in the case of seacraft. It is un-

desirable to begin by establishing what is, in effect, an abuse and a nuisance.

In Articles 11, 12, and 13 of my draft code, I give expression to the principles outlined above. Article 11 forbids belligerent service aircraft to enter neutral atmosphere or territory, and Article 12 imposes on neutral States the duty, so far as their means permit (for a State cannot do more than the resources at its disposal, in the shape of a national aircraft force, allow), to seize and detain any belligerent military aircraft violating the terms of Article 11. If, therefore, a belligerent's military aeroplane pursues a private enemy aeroplane, and the latter flies into neutral territory, the private aeroplane goes free (as it is not forbidden to enter neutral territory, under the rules of International Law), but the military aeroplane must, if it follows, be secured and interned. If it pursues and follows a military aeroplane of the other belligerent, *both* must be secured and interned.

Article 13 provides that an aircraft which is permanently assigned to a battleship and usually accompanies it, shall be regarded as part of the battleship so long as it remains in actual contact therewith. Some such provision appears necessary to meet the case of hydroplanes accompanying battleships or monoplanes carried on their decks. Such aircraft are practically a portion of the parent ship and as the latter is allowed to enter neutral waters and ports, an unpleasant and onerous duty would be imposed on neutral authorities if they had to treat the warship and its aeroplanes under different rules. To prevent abuses it is desirable to frame the provision so that it does not cover such

cases as the temporary attachment of a land service aeroplane to a battleship, with a view to enabling the former to be repaired in a neutral port, or the dispatch (on the wing) of a sea service aeroplane from territorial waters on a hostile mission; hence the wording of my proposed Article.

VI

DISTINGUISHING MARKS FOR AIRCRAFT AND THEIR CREWS

Necessity for an Irremovable Sign

On the question of distinguishing marks for military aircraft and their crews, the codes proposed appear to me unsatisfactory. They do not require the pilot or other airmen to be uniformed, and they do not require the distinctive service marks of the aircraft to be fixed and irremovable. Indeed, M. Fauchille expressly contemplates the case of "a private aviator having in reserve a sealed commission to be opened when required and a national flag to fly in case of conversion," *i.e.*, the case of a non-combatant suddenly assuming combatant status. Those who have followed the discussions at the Brussels and Hague Conferences will at once appreciate the difficulties and dangers which lie in such a procedure being tolerated. The separation of combatants from non-combatants is as necessary and important in the air as on land and sea. To recognise the legitimacy of *francs-tireurs* of the air is utterly out of the question. A distinctive mark that is removable at will is quite insufficient, and there

is the further objection to the use of a flag as a sign that, if used on an aeroplane, it might "foul" a control and cause accidents. What, exactly, the mark should be is a question for discussion and arrangement between the Powers. As distinguishing marks for military aircraft, French military aeroplanes bear on the under surface of each wing (the lower plane in a biplane) a tricolour cockade one metre in diameter, and dirigibles not only have their names in large black letters on the under surface of the front of the envelope, but also fly the national flag with a tricolour pennant above it. Mr. C. G. Grey, the able editor of *The Aeroplane*, suggests that a better plan, for aeroplanes, would be to cut sections of varying numbers or shapes out of the under-plane or wing, after the manner of the section which is cut away from the wing of the "Total Visibility" Blériot to allow the airman to see downwards. A similar section is cut away from the wing of the Clement-Bayard tandem monoplane (80 H.P. Clerget engine). He states that the system of painting marks on the under-surface proved unsatisfactory in the Balkan War; the distinguishing marks were not visible at the height at which the aircraft had to fly.

Necessity for Uniform

The crew of a military aircraft should also be distinguishable as soldiers, for they may have to leave the aircraft temporarily on landing—to gain information, to obtain petrol, etc.—in the enemy's country, and in the absence of a uniform or other distinguishing marks they might be regarded as spies. M. Bellenger holds that uniform is unnecessary, because,

if captured on land, the airman could produce his written authority as a military airman. But the military "spy" who is wearing civilian clothes cannot save himself on the plea that he has a commission or attestation in his pocket; he must have the *external* marks of a combatant. Moreover, uniform is the sign-manual of belligerency, the guarantee that the wearer is bound by the laws of civilised war. A belligerent might conceivably assume that men captured in military aircraft but not themselves in uniform were not *bonâ fide* members of that honourable trade-union of fighting men (if I may call it so) to which war law grants combatant rights, but chance civilians who did not "play the game," who did not observe and should not profit by its rules. It is noteworthy that under Article 30 of the French *Décret* of December 16, 1913, military aircraft must be under the orders of a commandant *wearing uniform* and also having a certificate establishing the military character of the aircraft. The latter requirement seems unnecessary in International Law.

VII

THE SEIZURE, CONFISCATION, AND DESTRUCTION OF PRIVATE ENEMY, AND NEUTRAL AIRCRAFT

In Sections II. and III., I have dealt on broad lines with most of the questions which concern the seizure and destruction of civilian aircraft, but a few points arising out of my suggested code provisions (see Articles 2, 6, 7, 18, 19, and 20) require some brief treatment. The tabular statement given at the end of Section X. (*see* p. 97, *post*) will be found useful in connection with the questions dealt with in this section—the treatment of aircraft—as well as in connection with those dealt with in the section in which it appears—the treatment of airmen.

Articles 2, 6 and 8 (espionage) show the circumstances in which private enemy aircraft may be *confiscated*, and these articles are made applicable to neutral aircraft also by Article 20. Article 4, already sufficiently noticed (*see* pp. 37–39, *supra*), shows the cases in which private enemy aircraft may be *sequestered*, and Articles 18 and 19 those in which neutral aircraft may be similarly detained. Article 4 and, for neutrals, Articles 18 and 19 state my suggested rules as to the *destruction* of civilian aircraft, in excep-

tional cases, *after descent*. Article 7 gives the cases in which alone private enemy aircraft may be *fired upon* "*on the wing*," and this article is applicable also to neutral aircraft (*see* Article 20).

Aircraft confiscated under Article 2 or under Article 6 become, of course, the absolute property of the confiscating belligerent, and may be used by him for his operations, provided they are converted into military aircraft of his own service under the terms of Article 1. But aircraft merely sequestrated under Article 4 cannot be so used; they are only subject to detention (or to destruction, if military necessities demand), not to military usage.

Confiscation of Civilian Aircraft entering Zones of Operations

My object in drafting Articles 6 and 7 (which are applicable to neutral aircraft also—*see* Article 20) is to make all but belligerent military aircraft give belligerents and their garrisons, fleets, etc., an extremely wide berth. Nothing short of some such provisions as those suggested in the two articles will, I submit, be found sufficient to keep zones of operations clear from the intrusions of journalists and war-correspondents when aviation is enlisted in the service of the Press, as indeed it has already begun to be. Reference should be made to pages 45, 50, and 52 *supra*. Of course, if neutrals or enemy civilians add to their offence by committing a hostile act, or by obtaining information on behalf of the enemy, the belligerent is entitled to inflict upon them the still heavier penalties entailed by unqualified belligerency or espionage.

The "orders" referred to in the second paragraph of Article 6 would be, *e.g.*, an order to follow a belligerent's military aircraft, or an order to proceed to a designated place. The "prescribed signal or warning to land" will have to be arranged between the Powers.[1]

The forbidden regions are purposely defined vaguely in the first paragraph ("zone of operations," "in the vicinity of"). Their limits will be a question of fact, to be decided by the belligerent affected, and the only safe rule for private aircraft will be to shun any place as to which a doubt can exist whether it comes within the prohibition or not. To make an exception for cases of error and *force majeure* would be to open the door to evasions of the rule.

Sequestration of such Aircraft an insufficient Deterrent

The suggestion that neutral aircraft should be confiscated if they enter a belligerent's zone of operations goes somewhat beyond the rule laid down by the Institute of International Law at its Ghent session of 1906, for the treatment of balloons equipped with wireless apparatus. The Institute's rule provided that neutral balloons should only be confiscated if by their wireless messages to the enemy they could be considered as being in hostile service. If this could not be established, it was laid down that the balloons with their crews should be expelled from the zone of operations, but that the wireless apparatus should be seized and held until the end of the war. This rule is not, of

[1] See the note on p. 157, *post*, as to the "prescribed signal" under British law.

course, an official international agreement and merely represents what the Institute think an international agreement should provide. The great progress of aviation since it was framed and the increasing use of speedy aeroplanes, whose value as messengers, even without wireless fitments, would be of very great strategical value, have made, I suggest, a sterner rule necessary for military reasons. In any case the rule only covers aircraft equipped with wireless. Some provision for aircraft not so equipped is necessary and sequestration seems an insufficient deterrent; private enemy aircraft will be, if my rule, which is also M. Fauchille's and the other French writers', is accepted, liable to sequestration even outside a zone of operations, and the treatment of private enemy aircraft and of neutral aircraft entering a theatre of operations ought to be identical. Very great financial stakes may be in question when civilian aircraft essay any service of this kind and nothing less than definitive capture seems to meet the case.

Destruction of Civilian Aircraft in Flight

In Article 7, I provide that private aircraft may only be fired upon in three cases, viz.: (1) if they engage in hostilities or espionage, (2) if they disobey a signal to land, (3) if, in very special circumstances, the belligerent concerned is prevented by imperative military necessity from giving such a signal. The reasons for which the third provision has been inserted have already been dealt with—*see* pages 45–46, 50–52, *supra*—and I have tried to show that the rule which the jurists propose, that private aircraft can only be

destroyed after a special summons, is incompatible with the right of military commanders to protect their forces and pursue their operations. Under my rules, it will be observed, no signal or warning is required in cases (1) and (3). The criticism may perhaps be made that, as it could not usually be established that aircraft had been guilty of hostile acts or of espionage until they had been ordered to descend for examination, my provision in Article 7, first paragraph, is unjust and inhuman. It amounts, I admit, to allowing condemnation on suspicion, but this is no new thing in the laws of war. The conscience of war law is elastic; it often presumes guilt when the law of peace presumes innocence ; suspicious circumstances are often enough to entail punishment—*e. g.*, in the case of the spy in land war. If private airmen engage in acts which are capable of being construed (perhaps misconstrued) as injurious acts, and which can only be prevented by immediate hostile action, they must pay for their foolhardiness or their ignorance by being treated as if they were really offenders. They should have avoided the dangerous conditions. It may be thought that paragraph (1) of the article proposed by me is unnecessary, as the case of hostile action or espionage can be dealt with under paragraph (3). But I can imagine cases in which "humanity" would not "demand" that private enemy aircraft (or neutral) should be given an opportunity of proving their innocence of such offences. If, for instance, a civilian airman discharged explosives or was clearly and unmistakably engaged in observing a belligerent's movements and signalling his information to the hostile forces, there would be no reason whatever

against shelling him without warning; non-combatants who meddle with hostilities cannot claim preferential treatment over proper combatants.

Article 7 applies to neutral as well as enemy aircraft (see Article 20, later). If neutral airmen, not in the enemy's service, engage in hostilities against a belligerent, they are not only liable to the risks and penalties sanctioned by International Law, with which alone I am concerned, but they may also be punishable under the national laws of the belligerent, if the latter, in his right of sovereign of the air, has "closed" his atmosphere against foreign airmen. They are therefore liable to penalties under the internal law—the *lex loci*—quite apart from any penalties authorised by the laws of war, which are really only the deterrent rules which a belligerent enforces in order that he may be able to carry on his operations without interference.

Seizure of Neutral Aircraft found in Belligerent Territory

Article 18 of my draft code provides that a belligerent may sequester (or destroy if he cannot remove) neutral aircraft found in hostile territory which he invades, but that such aircraft may be released in virtue of a special arrangement between the captor and the neutral owner's State. The corresponding provision of M. Fauchille's code goes further than my article. His Article 28 provides that "The subjects of a neutral State shall be treated like those of the belligerent States as regards aircraft belonging to them in the territories of the belligent parties." "A belligerent State," he explains, "ought to have power to requisition

aircraft belonging to neutrals as well as to its own nationals, and when an army invades or occupies hostile territory it should have the right to take possession of the machines of neutrals as well as those of the enemy ; a premium should not be put upon neutrality."

There is a precedent for the providing for the requisitioning of neutral property by the State in whose territory it happens to be in Article 19 of the Hague Convention on Neutrality in Land War. But that article refers only to railway material and empowers the neutral to requisition belligerent rolling-stock to an equal extent. Aircraft are more akin to war *matériel* than is railway material, and belligerents would hardly allow reciprocity in their case. But, apart from this, the matter is one for the *lex loci*, not for International Law to decide. If the belligerent's laws provide for the requisitioning of neutral aircraft in the country when martial law is proclaimed or a national emergency arises, it is not for International Law to say whether such impressment is valid or not. If the neutral national is aggrieved, he should have been more cautious about keeping his aircraft in a country with whose laws he was, apparently, unacquainted. It is otherwise with an invaded country : there, the *lex loci* is displaced by the laws of war when the invader takes possession, and the laws of war entitle the latter to carry away neutral aircraft found there so that the enemy may not be able to use them (as his national laws may empower him to) if the invader is driven back. The case is therefore one for International Law and it appears necessary to lay down an express rule.

As regards the second paragraph of Article 18, it

may be asked, What is the use of legislating for something which is purely facultative? I can only refer to the precedent of Article 2 of the Geneva Convention, 1906, which states that "belligerents are free to arrange with one another" such matters as the repatriation of wounded prisoners, etc. It seems to me advisable to make it clear that the rather grave liabilities of neutral aircraft-owners under the first paragraph may be mitigated by special arrangements between their Government and the belligerent; the latter, for instance, might safely allow the release of the aircraft if he were assured, on the faith of an undertaking endorsed by the owner's Government, that it would not return to the other belligerent's jurisdiction during the war.

Seizure of Aircraft consigned by a Neutral Contractor to a Belligerent

As regards Article 19 of my code, the rules of the Declaration of London, which M. Fauchille makes applicable, by cross-reference, to air conveyance of contraband, do not appear to me to cover such a case as that of aircraft consigned, under their own power, from a neutral contractor's workshops to a belligerent Government. Those rules contemplate aircraft as ship's cargo, not "on the wing." One must recognise a belligerent's right to intercept such air-delivered aircraft just as much as if it were sent by sea. Of course, his power of interception in the air, "visit" being impracticable, will be confined to territory belonging to or occupied by him, and it would probably be easy for the aircraft to avoid such dangerous

regions. But cases may possibly arise and some rule seems necessary. The rules of the Declaration of London, which regulate sea contraband and class aircraft, of whatever kind, as "conditional contraband," will certainly require reconsideration with the coming of specialisation in aircraft design, and it will be necessary to distinguish between aircraft specifically warlike and other aircraft.[1] My draft makes such a distinction for air "*quasi*-contraband." Contraband articles at sea are confiscated, but it is submitted that temporary seizure only should be allowed in the case of aircraft consigned by a neutral contractor to a belligerent country. Under my suggested Article 4, private enemy aircraft can only be sequestrated, even if designed for war, and it would be illogical to apply to neutral aircraft on the way to become private enemy aircraft a different and harsher rule. And if preventive seizure be the rule for warlike aircraft, it should be the rule also for ordinary aircraft which are seizable only if consigned to the enemy Government or a department thereof, for such aircraft have not become the property of the enemy State, and, moreover, nice discriminations in matters of this kind are provocative of trouble and generally undesirable. The provisions of my draft article ought not to result in any great interference with neutral aircraft; belligerents will probably learn, through their agents, what orders for each other's Governments, or for aircraft specifically designed or equipped for war, are held by neutral aircraft manufacturers and will know what aircraft to intercept and when. It is, of course, under-

[1] See pp. 104–105, *post*.

stood that their power of interception can only be exercised where they have a right to circulate—over their own and the enemy's territories, and over the high seas (though interception will probably be impracticable over the last).

VIII

THE TREATMENT OF PRIVATE ENEMY AIRCRAFT IN A BELLIGERENT'S TERRITORY AT THE OUTBREAK OF WAR

The Maritime Rule and Aircraft

M. FAUCHILLE has an article providing that private aircraft in the enemy's territory at the outbreak of war, and those arriving there in ignorance of hostilities, having left their last point of departure before war began, can only be seized and detained after a period of "grace"; but such a *délai de faveur* need not be granted to aircraft designed for use in war. This provision is borrowed from the Hague Convention on the Status of Enemy Merchant-ships at the Outbreak of Hostilities, which deals with merchant-ships similarly circumstanced at the opening of hostilities, and, in substance, expresses the hope that a belligerent will allow them to depart, without imposing any obligation upon him to do so. The Convention affirms a custom which had begun to prevail in modern practice; in 1904, for instance, Japan allowed Russian merchant-ships seven clear days' grace after the war began. The Convention expressly excepts from its scope merchant vessels *dont la construction indique qu'ils sont destinés à être transformés en bâtiments de*

guerre. Such vessels may, therefore, be confiscated. It seems to be neither necessary nor desirable to apply these rules to aircraft. Sea journeys, even in these days of steam and oil fuel engines, may still be a matter of weeks and months. Aircraft journeys will always be a matter of hours, and it will hardly happen that an aircraft will ascend before the outbreak of war and arrive in hostile territory after it, in ignorance of hostilities. And in the present state of telegraphic communication it is unlikely that aircraft in foreign territory already will be unaware that hostilities are pending in time to depart. It may be, of course, that there will be aircraft in the country which cannot depart, owing to their defective condition or to *force majeure*; but these would probably be debarred from leaving in any case owing to their being unable to start before the "days of grace" were out, for a belligerent cannot be expected to extend the period of free departure indefinitely. Again, there is no reason why aircraft should be treated more liberally than seacraft in this matter (indeed, the reason is the other way) and given an absolute right to free exit. And, if discretion is admitted at all, the provision recommending free departure as *desirable* would quite possibly become a dead letter. In the case of merchant vessels, experts can judge in most cases whether a ship has been designed for use in war or not. At any rate, there can be no doubt as to many merchant ships, that they are quite unsuitable for any warlike purpose. But *every* aircraft that can fly at all could be employed in war in some way or other—reconnaissance, observing the effects of artillery fire, carrying messages, etc. If the Hague rules were applied, there would be a

tendency, not only to exercise the right to detain aircraft clearly designed for war—those with armoured protection for the pilot and observer,[1] for instance, or fitted to take a machine gun,[2] or with bomb-dropping apparatus installed[3]—but to extend it to aircraft which would be specially useful in war (like Scout biplanes and fast monoplanes,[4] biplanes with roomy nacelles that could carry a couple of staff-officers,[5] those fitted with wireless installations,[6] etc.), or even, perhaps, with a little straining of the belligerent's conscience, to *all* flying machines except such as are unsafe and therefore might be allowed to depart not only with no loss but with actual advantage.

The Rule of Sequestration should be Upheld

M. Le Moyne gives an additional argument against the *délai de faveur*, namely, that aircraft, unlike ships,

[1] Such as the Bristol "Scout" and the Blériot armoured monoplane, in which the pilot is protected by bullet-proof nickel steel.

[2] Such as the Vickers "Type 18 B. Fighting Biplane," with an automatic gun in the nose, the Avro "Gun-carrying Push Machine," and the M. Farman military type biplane with Lewis automatic gun, shown at Olympia. The Borel monoplane shown at the Paris show in 1913, with a machine-gun far out in front and the propellor at the rear of the tail-plane and rudder, is another example. There is a Nieuport (tandem) monoplane fitted to take a gun for firing upwards and backwards.

[3] Such as the Bristol tractor biplanes supplied to the Roumanian army: they have an apparatus under the passenger's seat holding twelve bombs which can be released by the foot, and also vertical and horizontal sighting apparatus. The Farmans have also a bomb-dropping and sighting apparatus.

[4] Such as the Sopwith "Scout," Bristol "Baby," and Arro "Scout" among biplanes, and such monoplanes as the Ponnier, Deperdussin, Nieuport, or Morane-Saulnier.

[5] Such as the Grahame-White five-seater, etc.

[6] Such as the Bréguet, shown at Paris in 1913, or the Henry Farman, shown at Olympia in 1914, the installations of which are said to have a range of 120 and 110 miles respectively. Seaplanes have actually sent wireless messages over 100 miles, and land aeroplanes over 50.

may be spread all over a territory instead of confined to the coastline, and therefore, if allowed to depart, would be crossing the enemy's atmosphere just at the time of mobilisation and concentration. But this could be provided for by the aircraft being returned to their country by ship or rail, or, at any rate, by such a route as the authorities of the country would direct, and by care being taken that their crews did not observe the military preparations. All things considered, however, I think that the best working rule, and a not inequitable one on the whole, is to treat private aircraft in hostile territory when war begins, or arriving there in ignorance of hostilities, in the same way as all other private enemy aircraft and to make them liable to sequestration. If aircraft owners appear to be more severely dealt with under such a rule than are shipowners under the Hague rule, it must be remembered that the latter are liable to burdens which the former escape, viz., the liability to have their vessels requisitioned, if detained, or even confiscated, if considered by the belligerent to be designed for war.

IX

AIRCRAFT AND THE "ALABAMA" RULE

Arguments for and against an "Alabama" Rule for Aircraft

In a paper entitled "War Law for Aircraft" contributed by me to the *Army Review* for April, 1914, the suggestion was put forward that the rule of maritime neutrality under which a neutral Power is bound to use the means at its disposal to prevent ships intended for use by a belligerent from being built in and dispatched from its jurisdiction, should be extended to the case of aircraft. In that article I wrote :—

"The reason for the maritime rule is that an armed ship differs from all other munitions of war in the degree in which it approaches to a complete means of attacking the enemy, and that if such a ship is built in and dispatched from a neutral port, to be used by a belligerent, the neutral port has in fact served as the "base" of an "expedition" against a friendly Power. And it is not necessary that the ship should be fully armed or manned to make it incumbent on the neutral State to prevent its departure : witness the case of the *Alabama*, which only received her guns at Terceira.

An aircraft is more akin to a warship than to other kinds of war *matériel:* it is capable of doing damage the moment it leaves the neutral territory, for, apart from its employment on the service of observation, a speedy and perhaps armour-protected war aeroplane could capture or destroy the private aircraft of the enemy by the use of bombs or such a mobile weapon as the Lewis automatic gun, just as a ship designed for war could capture merchant vessels with the small arms of her crew alone. Against the view which I have taken, however, must be weighed the action of the French Government at the beginning of the Italo-Turkish War. That Government was approached by Italy with a view to the prevention of the export from France of aeroplanes destined for the use of the Turkish forces. The French reply, as explained by M. Poincaré in the Chamber of Deputies, on January 22, 1912 (see the *Revue de la Locomotion aérienne*, February, 1912), was that aeroplanes came under the same rules as war material generally, even if they were *destinés à projeter des bombes*, and that therefore their export was not forbidden by the laws of neutrality. I cannot see how this view can be defended if the opposite view is sound and necessary where sea vessels are concerned. The fact that aeroplanes can be built and equipped with a celerity and secrecy which are impossible in ship-building is immaterial; a belligerent Government would make it its business to learn what aircraft are being built in neutral contractors' workshops for its enemy's orders and would warn the neutral authorities accordingly."

Practical Objections to Applying the Rule to Aircraft

On further consideration, I have come to the conclusion that the suggestion to apply the maritime rule to aircraft is hardly practicable. Theoretically it ought to be applied. If, as is suggested, belligerent aircraft are forbidden to enter or leave neutral territory or waters, whereas seacraft are not debarred from putting into neutral ports and leaving again, there would be a still stronger ground for having an *Alabama* rule for aircraft than for seacraft; that is to say, it would be still more necessary, on first principles, to hold a neutral State responsible for allowing aircraft, not yet the actual property of a belligerent, but destined for his use and for employment in the current war, to depart freely from its jurisdiction. But the practical difficulties in the case of aircraft are very great. Whenever a war broke out in any part of the world, however distant, every neutral State would have, practically, to picket with officials all the aircraft manufacturers' yards in the country. There would be lacking the existent machinery of port and harbour officials which can be relied upon to prevent sea vessels from compromising the State's neutrality. It appears to me, on reflection, that the extension of the maritime rule would throw too onerous and difficult a duty upon neutral countries and that for this reason it is not "practical politics." In any case the commercial damage which would be wrought by an aircraft smuggled out of neutral territory for a belligerent's service would never be as serious as that wrought by the *Alabama* and *Georgia* in the Secession War; and although the potential military advantage which

even a single aircraft represents might be of more importance than any commerce-destroying service, it must be remembered that a neutral State is not bound to prevent the export of munitions of war and would not be responsible if a belligerent purchased from a neutral contractor howitzers and torpedoes capable of destroying his enemy's entire army and fleet.

The Hague Conventions on Neutrality in Land War and in Maritime War (Article 7 of each) state expressly that "a neutral Power is not bound to prevent the export or transit, on behalf of one or other belligerent, of arms, munitions, or anything which can be utilised by an army or fleet." There can be no question, therefore, of a neutral Government being bound to prevent its nationals from selling or conveying to a belligerent such component parts, even of war aeroplanes, as propellers, tractors, rudder-bars, warping-levers, fusilages, booms, struts, skids, cables, plane or balloon fabrics, etc. The aircraft or the parts referred to could be seized by the other belligerent on their way to the enemy, but their being furnished to the latter by neutral nationals would not constitute an unneutral act on the part of the neutral State itself.

A neutral Government must not *itself* supply any munitions, aircraft, parts or accessories of aircraft, or anything for use in war, to a belligerent. This is clear from Article 6 of the Maritime Neutrality Convention. If a Power contracted to sell its obsolescent or surplus aircraft to another Government, and the latter became involved in war before the delivery, the contract would have to be suspended. Direct assistance of a belligerent by a neutral Government is strictly prohibited by the laws of neutrality.

X

THE TREATMENT OF CIVILIAN ENEMY AND NEUTRAL AIRMEN

MM. Fauchille's and Bellenger's Suggestions

M. FAUCHILLE proposes that, when a civilian enemy aircraft is seized, the crew should not be made prisoners of war, but allowed to go free on their undertaking not to engage in any service connected with the war, while hostilities last. M. Bellenger goes farther than M. Fauchille, and states that the crews of such sequestrated aircraft should be left free to return to their own country without giving any undertaking. I am more than doubtful whether captors will grant the crews even the conditional liberty which M. Fauchille recommends. An airman is, in war time, a very valuable asset to his country. He is even more valuable than is the captain or officer of a merchant vessel. Yet the captains and crews of merchant vessels were always held as prisoners of war until the Hague Convention of 1907, on Restrictions on Capture in Maritime War, introduced a milder practice. I do not think that it is likely that a similar concession will be made to captured civilian airmen, at all events until they cease to be such rare and valuable specialists as they are at present. In

my draft code I propose that it should be provided that private enemy airmen are *entitled to the privileges of prisoners of war.* There is nothing to prevent the captor from allowing them their freedom if he so desires.

Civilian enemy airmen whose machines are confiscated for having approached a scene of operations or a belligerent's forts or garrisons, or for disobeying a signal to land, may fairly be regarded as having been punished sufficiently by the loss of their property. They should therefore be treated like the crews of sequestrated enemy aircraft, that is, if the captor detains them, he must grant them the privileges of prisoners of war. (*See* Bellenger, *La guerre aérienne*, p. 102.)

If the confiscation is in respect of espionage or improper participation, to whatever degree, in hostilities, the culpable civilian airmen are not entitled to the rights of prisoners of war and may be brought before the courts, *i.e.*, before councils of war trying offences under the laws of war.

The Treatment of Captured Neutral Airmen

So, too, may neutral airmen guilty of espionage or hostile acts; but otherwise the treatment of neutral and enemy airmen will differ with the different motives for seizure applying in the two cases. Private enemy aircraft and their crews are seized and detained in order to deprive the enemy of *matériel* and *personnel* which would otherwise be available for his use. Neutral aircraft, on the other hand, apart from cases of espionage and hostile acts, are only confiscated on ac-

count of acts which may be held to be sufficiently penalised by the confiscation[1] (these acts being, if my suggestions be accepted—see Articles 6 and 20—such acts as approaching a scene of operations, or disobeying an order to land), and are only sequestrated because they are, or would shortly be, at the enemy's disposal if not seized. There is not the same reason for detaining the airmen themselves as there is for detaining airmen who are enemy nationals. The complete or temporary loss of their machines ought to act as a sufficient preventive against a recurrence of the acts for which they have been punished, including the keeping of their aircraft in a belligerent's territory, and the conveying of a warlike aircraft to a belligerent national or of an aircraft of any kind to the belligerent Government.

Neutral Airmen in Enemy Aircraft

Neutral nationals who take military service with a belligerent, whether as airmen or in any other capacity, are treated like ordinary belligerent troops. They have, in fact, taken on the character of belligerent nationals for the time being and ceased to be neutrals. They are, therefore, if captured, held as prisoners of war in the usual way. If, however, they have not enrolled themselves in the belligerent's forces but have merely been acting as pilots of private enemy aircraft, they cannot be considered to have wholly lost their neutral character and may fairly be granted the

[1] The neutral airmen *may*, however, be liable to penalties under the *national* law of the belligerent, as, for example, if they have violated a general prohibition of the circulation of neutral aircraft. Such penalties are incurred under the *lex loci*, not under International Law.

privileges extended to neutral subjects serving on belligerent merchant vessels by the Hague Convention on certain Restrictions on the Exercise of the Right of Capture in Maritime War. In giving them their liberty, the belligerent captor can take measures to ensure that their release will not operate to the advantage of his enemy and he has no further interest in detaining them in captivity. If, having given an undertaking not to return to the other belligerent's country nor to assist him in any way, they break their promise and are recaptured, they would not again be granted their liberty but would be detained as prisoners.

As the rules suggested for applications in the cases referred to are somewhat complicated, I have tried to set them out clearly in the tabular statement that follows.

TABULAR STATEMENT SHOWING THE TREATMENT OF BELLIGERENT AND NEUTRAL AIRCRAFT AND AIRMEN WHEN THEY FALL INTO THE OTHER BELLIGERENT'S HANDS

XI

THE RELATION OF AERIAL LAW TO EXISTING CONVENTIONS

Necessity for a Special Code

THE necessity for a special code for aircraft may be questioned—and, indeed, has been questioned by Professor Meurer—on the ground that aircraft will be merely auxiliaries of armies and fleets and will therefore be regulated by the rules which govern land and maritime war respectively. Here, again, one finds a misconception of the character and *rôle* of the new arm. A special code is necessary simply owing to the unprecedented fact that aircraft move and fight neither on land nor on sea. In an article of my draft code I provide that aircraft permanently assigned to a battleship and remaining in contact therewith shall be regarded as a part of the battleship; but, with this possible exception, the ordinary rules will not, I think, govern aircraft and they will have to be specially legislated for. Their coming has brought up quite new problems of war. Moreover, exactly the same kind of aircraft may be used in the land and sea services, and a naval aeroplane may quite possibly act as an auxiliary to the army, and an army aeroplane to

the fleet. If the laws of war were the same for armies and for fleets, no difficulty would arise. But they are not. There are fundamental differences. The unit in sea war is the ship; in land war, it is the individual soldier—he must wear a uniform, carry arms openly, etc., and is not protected from a charge of "unqualified belligerency" by the plea that his regiment displays the national flag. The laws regarding passage through neutral territory or territorial waters are quite different in land and sea operations. It would obviously be objectionable to apply to aircraft a double set of rules which are in disagreement on many important points. Further, as the laws of land and sea warfare differ as regards the treatment of private property, how, without some special code, could one deal with a question respecting such property when it is not clear whether it comes within the domain of sea or of land warfare, as, for instance, in a case arising in a besieged and blockaded port? One has only to imagine, if one can, the kind of problem which will arise in connection with aircraft, to see that a separate set of rules is absolutely necessary.

A Single Code for all Aircraft possible

There does not appear to be any practical difficulty in bringing *all* aircraft, naval and land, under a single code for the air; and this would be in accordance with the principle of the *Voeu* expressed by the last Hague Conference, "that the Powers should apply, as far as possible, to war by sea the principles of the Convention relative to the laws and customs of war on land." The question of a code for sea warfare corresponding to the

Règlement for land warfare is to be discussed at the next Hague Conference. A draft project on these lines was presented by M. Paul Fauchille to the Institute of International Law at its Oxford session of 1913.[1]

It may, therefore, be fairly maintained that airmen serving with a fleet shall be considered subject to the general rules of the *Règlement* and for this I have provided in Article 3 of my code; they would also come under the domain of such enactments as the Declaration of St. Petersburg, and the Hague Declarations relative to Asphyxiating Gases and Expanding Bullets. A military airman is a soldier or sailor as well as a flying man, and in all that affects him in the former capacity he is bound by the same rules as any other member of the armed forces of his nation. He must not, *e.g.*, because he is an airman, refuse quarter, use poisoned arms, or explosive or expanding bullets, etc., and he is entitled, if wounded, to the protection of the Geneva Convention. The laws and customs of war, as defined in the great Conventions and Declarations, correspond to the ordinary law for the soldier or sailor on service, and a military airman is bound by their terms as well as by the special code which governs aircraft.

The Scope of the Aerial Code

The exact defining of the boundary to be assigned to the scope of the special code is a matter of some difficulty. This difficulty is especially marked in questions concerning neutrals, though one finds it to a less degree in such questions as espionage and

[1] See the *Annuaire* of the Institute for 1913, and the *Revue de Droit international*, January-February, 1914.

bombardment. There are at present two quite distinct Neutrality Conventions, one for land and one for sea warfare. Both of these Conventions contain provisions relative to the supply of material of war to belligerents. Under neither does the supply of aircraft naturally fall. The Maritime Neutrality Convention imposes on neutral States the duty of preventing the export from their jurisdiction of vessels destined for a belligerent's use in the war. In view of the analogy between sea and air vessels, it might be thought that they were similarly bound to prevent the export of aircraft ; but for reasons already stated (*see* p. 91), it will probably be ruled that no such obligation arises in the case of aircraft, and the rule on the subject should, therefore, for the sake of clearness, appear in the special code. And if one rule governing the supply of aircraft by neutrals appears, any other rules which are required to make the air law of the question complete and beyond doubt should also appear. Again, both of the existing Conventions have articles dealing with the use by belligerents of wireless apparatus in neutral territory. The use of such apparatus by belligerent aircraft is a question which does not pertain properly to either Convention and which ought to be legislated for in the special code.

It is much to be desired that some future Peace Conference should consolidate the two existing Conventions into one single Convention and add thereto any rules affecting aircraft. There would then be one general Convention on neutrality for land, air, and sea. Until this is done it seems necessary to include in the air code some provisions which may appear at first sight to be out of place in such a body of rules.

XII

SOME SUGGESTED MODIFICATIONS OF THE LAWS OF LAND AND MARITIME WAR

Flight and International Law generally

THE development of flight will necessitate a special code for the air, but it will also lead to some amendments and additions being made in International Law generally. There are a few questions which are not so much specific "flight" questions as questions primarily and principally of the laws of land and sea warfare arising at the point where these latter laws are brought into contact with the new science. Such questions as sea contraband, armistices, *parlementaires*, military occupation, and the destruction and sequestration of private property in land war, as affected by the introduction of aviation, are more properly dealt with under the rules of sea or land warfare than under an aerial code. To the five points mentioned I shall refer briefly in this section, while the next section will be devoted to a more difficult question, the question of attacks by non-military persons on isolated enemy airmen. It would be rash to say that these are the only questions of the kind. Without doubt time will bring many more to light, but it is sufficient at present to discuss the few to which I refer.

Contraband of War at Sea

The Declaration of London, which, although not ratified by Great Britain, may be taken as representing an accepted rule of the unwritten law of maritime war for the present purpose, classes as "conditional contraband":

"Balloons and flying machines and their distinctive component parts, as well as accessories, articles and materials distinctively pertaining to aerostation or aviation."

"Conditional contraband" is liable to be captured if proved to be destined for the use of the armed forces or departments of the enemy Government. It differs in this from "absolute contraband," which is confiscable if merely bound for the enemy's territory and consigned to private individuals or firms therein. The reason for the distinction is that "absolute contraband" consists of articles exclusively used in war, whereas "conditional contraband" includes articles *anticipitis usus*, or things which can be used for purposes of war and peace indifferently. Since the Declaration was drafted, aircraft have begun to be specialised for war, and the specialisation is likely to be further emphasised as time goes on. It will probably be found necessary to class certain types of aircraft—those fitted to take a machine-gun or with bomb-dropping mechanisms, or with armoured protection for the pilot and observer—as "absolute," and ordinary types as "conditional contraband." Such a distinction was made in the Declaration of London in the case of clothing, equipment, harness, etc., which are "absolute" or "con-

ditional contraband" according as they are "of a distinctively military character" or not.

Aircraft and Armistices

The other questions concern land war. The rule that is sometimes laid down by jurists that, during an armistice, a commander may not alter his dispositions or move up new troops, even within his advanced lines, because, if there had been no armistice, the enemy might have prevented him from doing so, finds no support in practice. The rule followed in modern armistices has been that each belligerent retains his right to do everything which is not specifically forbidden in the terms of the armistice and which does not amount to the resumption of hostilities. In the wars of the future, if there be no express agreement on the point, it would be easy for the aircraft on each side, without going beyond the advanced lines, to spy out whatever is happening within the other lines if the zone of demarcation is not a very wide one. In fact, there will be similar questions to that which arose in 1878, when Todleben erected high observation posts along his lines during the armistice of San Stefano, and Fuad Pasha, fearing that his troops' entrenchments would be overlooked, threatened to open fire on the posts if they were not removed. Perhaps, where the zone of demarcation is necessarily a narrow one, it will be necessary, in arranging the terms of the armistice, for the commanders on each side to agree not to send up their aircraft during the suspension of hostilities.

Flags of Truce and Military Occupation

The difficulties in connection with *parlementaires* and military occupation will be, in the former case, that an aircraft coming with a flag of truce would have an opportunity of observing the enemy's dispositions, and, in the second, that there may be a tendency to consider a territory effectively occupied if it is visited by an occasional aircraft representing the authority of a, perhaps, far distant enemy commander. It will probably be found necessary either to declare aircraft ineligible as *parlementaires* or to enforce a strict rule that they must land (and the airman be blindfolded) at a considerable distance outside the lines of the troops to whom the flag of truce is sent, and military occupation will probably not be considered effective unless the aircraft are supplemented by some land force—mobile columns, etc.

The Destruction of Enemy Property

The Hague *Règlement* (Article 23(*g*)) forbids the destruction of enemy property "unless such destruction be imperatively demanded by the necessities of war": that is, it recognises, by implication, that sound military reasons may justify the destruction of any kind of property. It also provides for the requisitioning of enemy property or services for the needs of an occupying army. The latter can demand supplies from the local inhabitants, or can call upon them to carry out any service which does not involve taking part in military operations against their own country. Requisitions in kind have to be paid for, under Article 52 of

the *Règlement*. But no provision is made for payment for any services which the inhabitants may be forced to render or for any loss they may sustain through the justifiable destruction of their property for military reasons. It is in respect, especially, of this latter kind of loss that cases of hardship are likely to arise in future wars. The burning of woods and forests will probably be a feature of future campaigns. Wooded country will be chosen for the movements of troops because it will afford them concealment from the enemy's aerial scouts, and an army which anticipates the delivery of an attack through country of this description will not hesitate to destroy the cover which might facilitate the enemy's advance. Private individuals may see their valuable timber destroyed without having, as the *Règlement* stands, any hope of redress. It is to be desired that the next Hague Conference will amplify the rule as to payment by bringing under its scope cases in which property is destroyed as well as those in which it is seized.

The Seizure of Private Matériel *and Indemnities therefor*

The drafts of MM. Fauchille, d'Hooghe, and Le Moyne provide that sequestrated private enemy aircraft shall be restored to the owners at the peace without indemnity. In my proposed Article 4 I have followed their view and my reasons for doing so are stated on page 38, *supra*. Article 53 of the Hague *Règlement* stipulates that indemnities shall be paid in respect of any private property utilisable in war, including aircraft, which is seized by a belligerent

in war on land. It would be better if it were laid down that the actual property seized must in all cases be restored except where its destruction is demanded by the necessities of war. An invader who takes possession of private stores of war *matériel* should not be allowed to make use of such *materiel* against the national forces of the owners : and the principle of the seizure, namely, that it is a deposit in safe keeping and returnable in actual substance at the close of hostilities, would be emphasised if the reference to indemnities were deleted.

XIII

ISOLATED ENEMY AIRMEN AND ATTACKS BY NON-MILITARY POPULATIONS

Aircraft Raids

THE relation of a non-combatant population and raiding or scouting enemy aircraft is a question which will probably give rise to difficulties. It will be a long time before war sees "Jeb Stuarts of the air" leading great masses of aircraft—scores of flights and *escadrilles*—in daring raids into the heart of a hostile country; but one can imagine as realisable and indeed probable the case of a belligerent aeroplane landing for some purpose in enemy territory and the local inhabitants surrounding and overwhelming the isolated airman. If, a few days later, the troops to which he belonged march into the place, can they arrest, try, condemn, and execute the inhabitants concerned as unqualified belligerents?

The Law of Land War

The rule of war is that, with one exception and one only, hostilities may only be carried on by a country's accredited agents of warfare, its properly authorised

troops, whether Regular, Reserve, or Territorial, Active Army, Landwehr or Landsturm, First Ban, Second Ban, or Third Ban, Nizam, Ichtiat, Redif or Mustchafiz. The only exception is the case of what is called the *levée en masse*, that is, the case of a spontaneous rising in force by the inhabitants of a territory not yet occupied by the enemy, with the object of resisting the invaders. The persons who make up the *levée* must carry arms openly and must respect the laws of war, but they need not have the "fixed distinctive sign recognisable at a distance" nor the military organisation, both of which are required of troops generally. Any civilians who engage in hostilities without coming under the scope of this exception may be treated as "unqualified combatants" and shot after their culpability has been duly established. The rule is stern because it represents the price which populations have had to pay to belligerency for allowing a sharp line to be drawn between the warlike and unwarlike parts of a community. If an invader grants immunity to the non-combatant residents of the enemy country, he grants it on the condition that they remain non-combatants whether he comes in strength or in weakness. A halting between two opinions as to one's *status* as fighting man or civilian is not tolerated by the custom of war.

Aircraft Raids when there is Invasion

The cases which have actually arisen in modern war have, from the nature of things, been cases of attacks upon isolated scouts, detachments, stragglers or orderlies who were separated by no great distance—not more

than by a march or two—from the force to which they belonged. They have been cases where the hostile army has been, so to speak, within call. And this propinquity, this power to follow hot-foot upon any irregular attack, has an important bearing on the question. If the enemy are at the gates, it may fairly be assumed that the inhabitants of neighbouring districts have already made up their minds whether they are to be fighting men or not. If they mean to strike a blow for their country, they can do so by banding themselves together in force, by setting themselves apart from the ordinary civil population, and by carrying arms openly. They can make their character absolutely unmistakable by forming a massed levy. In the imaginary case cited above, it is assumed that the attack on the isolated airman is delivered by persons who claim to be and appear to be non-combatants when the enemy comes in strength. Such persons can justifiably be treated by the invader with all the rigour of the laws of war. Their case is, at bottom, analogous with that of the French peasants who attacked the Uhlan scouts in 1870–1 and were severely punished by the Germans in all cases.[1]

[1] The action of the German commanders is approved by the French writer Brenet, who points out the uselessness of the French peasants' resistance: "It must be admitted that their (the *Francs-tireurs*') desultory efforts, their shots at the German vedettes, simply envenomed the War without breaking the force of the German advance. Some Uhlans fell, but, behind them, pressed on, without one hour's delay, the advance of the main bodies."—*La France et l'Allemagne devant le droit international*, p. 6. "If," he says, "the (non-military) inhabitant takes part in the desperate struggle of his compatriots, if he has everything to fear from the triumph of the enemy, can he not throw off his peaceable *status*, may he not arm himself to stop the invader's march? No, *that* is forbidden by the law of nations; for, if it were allowed, the enemy soldier, who is the victim of an irregular attack which was not anticipated

Aircraft Raids when there is no Invasion

It is different where the invader has not set foot on the soil. In these days of aerial flight, when non-stop journeys of 600 to over 1000 miles have actually been achieved[1] and when the radius of action of aircraft is ever widening little by little, it is clear that even an island Power which holds command of the sea is not free from the intrusion of scouting enemy aircraft. Despite all England's strength at sea, her cities will lie as open to raids in the wars of to-morrow as Carlisle did in the days of the Border forays. Suppose, then, that the army of the foreign Power has not yet set foot in the territory in which the airman is attacked, that, say, a fellow airman who was accompanying him escapes and informs his superiors of the incident, and that subsequently the country is invaded and the scene of the attack occupied by the enemy's troops. Are the local inhabitants liable to punishment under the laws of war? It is submitted that they should not be so considered. The case is without precedent in theory or practice, and must be considered on its merits. When the airman was attacked the laws of war were not in force in the country; no part of it was occupied by the invading army and it is only when an invading army comes that

would be justified in turning ruthlessly upon his assailants and exacting vengeance by every means. War would become an extermination, no longer a chivalrous struggle but simply an abominable butchery, before the horror of which the imagination recoils."—*Ibid.*, pp. 3–4.

[1] M. Séguin's journey of 646 miles, M. Gilbert's of 650, and M. Brinjedonc-des-Moulinais' of about 838, have lately been put in the shade by the wonderful non-stop flight of Herr Ingold of over 1300 miles at Mühlausen.

the laws of war begin to run—it carries them, so to speak, on its bayonets. They extend, it is true, beyond the ground on which the invader stands and they must be respected wherever any detached portions, or even single soldiers, of the invading army go. But it is impossible to admit that they can be called into being by the presence of a single airman, or of two or three airmen, whose army has not passed the frontiers and who claim a right to privileges which arise from and only rest upon the power to enforce them. Moreover, when an aeroplane drops from the clouds, there is no time for organising a *levée en masse*. The law of war recognises the right of populations to spring to arms when the invader comes, and if the new condition of things has made it impossible in some cases to do so in the exact manner contemplated in the *Règlement*, populations should not be made to suffer because the world has moved on.

APPENDIX I

A Code for Aircraft in War, as Proposed by the Author

ARTICLE 1.—An aircraft shall be considered to be a military aircraft and its crew to be belligerents provided the aircraft is under the direct authority, immediate control, and responsibility of a belligerent Power, that it bears the distinctive sign of its character as a military aircraft of the said Power, irremovable and recognisable at a distance, and that its crew are subject to military discipline, observe the laws and customs of war, and wear the uniform or other distinguishing emblem of their national forces.

See pages 72–74, *supra*, and Fauchille, Articles 1 and 4, Peace Code. The wording of the above Article is based on that of Articles 1 to 5 of the Hague Convention relative to the Conversion of Merchant-ships into War-ships, and of Article 1 of the Hague *Règlement.*

ARTICLE 2.—The crews of all other aircraft engaging in any act of hostilities may be brought before the courts as unqualified belligerents, and the aircraft may be confiscated.

An "act of hostilities" includes the conveyance of individual passengers who are embodied in the armed forces of the enemy, the transmission of intelligence in the interest of the enemy (whether by carrying messages

or despatches, or by the use of code lamps, signals, or wireless telegraphy), and the carriage of munitions of any kind.

See Fauchille, Articles 2 and 3, War Code, and pages 51, 76, 97, *supra*.

The expression "brought before the courts" is borrowed from Article 12 of the Hague *Règlement*, which provides that prisoners of war liberated on parole and recaptured bearing arms may be brought *devant les tribunaux*. The courts in question will be councils of war, trying offences under the laws and customs of war. In addition to any punishment awarded by the council of war for the improper participation in hostilities, the aircraft itself will be treated like an enemy military aircraft and confiscated.

The wording of the second paragraph is based, for the most part, on the chapter in the "Declaration of London," 1909, dealing with "L'assistance hostile."

ARTICLE 3.—The crews of military aircraft are, in respect of everything that concerns them as individuals in the armed service of a belligerent, under the domain of the various Declarations and Conventions which regulate war and neutrality, so far as the said Declarations and Conventions are not inconsistent with the provisions of the present code.

See Fauchille, Article 4, War Code, and pages 100–101, *supra*.

ARTICLE 4.—Private enemy aircraft may be seized by a belligerent, but they must be restored at the peace without indemnity; or, if their destruction be imperatively demanded by the necessities of war, the compensation to be paid shall be arranged at the peace.

The above provision applies equally to private aircraft designed or equipped for war and to aircraft not so designed or equipped.

Code Proposed by the Author]

See pages 37–39, 75, *supra*, and Fauchille, Article 9, War Code.

ARTICLE 5.—The neutral or enemy character of an aircraft is determined by the distinctive sign of nationality which it has the right to bear.

See Fauchille, Article 11.

I have taken this article, without modification, from the codes of MM. Fauchille, d'Hooghe, and Le Moyne, in all of which it appears. Signs of nationality will have to be fixed by arrangement between the Powers. Under the *Décret* of 16 Decr., 1913, French aircraft have to be marked with a large F. There is no British legislation on the subject.

ARTICLE 6.—Private enemy aircraft may be confiscated :—

(1) if they circulate in a belligerent's zone of operations, on land or sea, or in the vicinity of his troops, warships, military aircraft,transports, military works, military or naval establishments, stores, depots, workshops, etc. ;

(2) if they disobey a belligerent's orders or his prescribed signal or warning to land.

See Fauchille, Article 9, second paragraph, War Code, and pages 45–46, 52, and 76–78, *supra.*

ARTICLE 7.—Private enemy aircraft may only be fired apon, endangered, or destroyed in flight :—

(1) if they engage in any act of hostilities, as defined in Article 2, or of espionage ;

(2) if they disobey a belligerent's orders or his prescribed signal or warning to land ;

(3) if the circumstances of the case are such that a belligerent is forced by imperative military necessity

to omit the signal or warning to land which humanity demands.

See Fauchille, Article 13, and pages 45–47, 50, 53, and 78–80, *supra*.

ARTICLE 8.—The crew of a private enemy aircraft can only be considered suspected of espionage if they obtain or seek to obtain information above the territory or territorial waters of a belligerent, or above territory or territorial waters occupied or held by his military or naval forces, or above his squadrons, warships, transports, or aircraft, or, generally, in the zone of his operations, with the intention of communicating the information to the hostile party.

In the case of enemy military aircraft acting in the same way, the crew can only be considered suspected of espionage if they disguise or try to disguise their aircraft's real character as an enemy military aircraft, or otherwise act on false pretences.

When an individual lands from aircraft to carry out a service of espionage, his case falls, in accordance with the general principle, under the rules governing espionage in land warfare.

Persons suspected of espionage may be brought before the courts; they cannot be punished without previous trial, and cannot, after rejoining their forces, be punished on subsequent capture for past acts of espionage.

Aircraft concerned in espionage may be confiscated.

See pages 34–36, *supra*, and Fauchille, Article 7, War Code. The "general principle" referred to in the third paragraph is contained in Article 3, *supra*.

ARTICLE 9.—The crews of private enemy aircraft which have not engaged in hostilities or in espionage are entitled to the privileges of prisoners of war.

See pages 93–94, 97, *supra*, and Fauchille, Article 12. The provisions of Article 9 are subject to the

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exception in favour of neutral nationals provided by Article 20, *q.v.*

ARTICLE 10.—The provisions of the Hague Convention on Bombardment by Naval Forces in Time of War shall be applied, as far as possible, to bombardments by aircraft.

Bombardments by aircraft must in all cases be authorised by the Admiral or General in command of the force to which the aircraft are attached.

See pages 11–23, and 30–34, *supra*, and Fauchille, Article 6. The Hague Convention referred to is given in Appendix VII.

ARTICLE 11.—Belligerent military aircraft are forbidden to enter the territory, territorial waters, or atmosphere of a neutral Power.

See my remarks at pages 65–70, *supra*, and Fauchille, Articles 7 to 10, Peace Code, and Articles 1 and 19, War.

ARTICLE 12.—A neutral Power is bound to exercise such vigilance as the means at its disposal permit to prevent any violation of the provisions of Article 11.

It is bound to take such measures as are necessary and possible to take possession of belligerent military aircraft entering its territory, territorial waters, or atmosphere, whether voluntarily or under *force majeure*, and to detain the aircraft until the peace.

The crew of such aircraft shall be dealt with in the same way as the land forces of a belligerent entering neutral territory.

See Fauchille, Article 19, and pages 65–70, *supra*.

Land troops of a belligerent entering neutral territory have, under the Convention on Neutrality in Land War, to be interned, in camps or fortresses, at some distance (if possible) from the theatre of war; the cost

of their maintenance is refunded by their Government to the neutral State at the end of the war.

ARTICLE 13.—As an exception to the provisions of Articles 11 and 12, an aircraft which is permanently assigned to a battleship and usually accompanies it, shall be regarded as forming part of the battleship so long as it remains in actual contact therewith.

See pages 70–71, *supra*.

ARTICLE 14.—The supply in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of aircraft, or the parts, materials, accessories, or anything which can be used in the manufacture, fitting, and arming of aircraft, is forbidden.

See Fauchille, Article 19, last paragraph, and page 92, *supra*.

ARTICLE 15.—A neutral Power is not bound to prevent the export or transit, on behalf of either belligerent, of aircraft or their parts, materials, accessories, or fittings.

See Fauchille, Article 19, last paragraph, and pages 89–92, *supra*.

ARTICLE 16.—A neutral Power, whose frontiers border a belligerent's frontiers, is bound to exercise such vigilance as the means at its disposal permit to prevent its atmosphere from being used for the purpose of observation, on behalf of one belligerent, of the movements, defences, etc., of the other.

This article is intended to secure the object of Article 20 of the *projet* Fauchille, which prohibits the aerial navigation of neutral countries within a radius of 11,000 metres from the frontiers of a belligerent: a grave derogation of the ordinary rights of neutrals, as M. Renault pointed out.

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ARTICLE 17.—As regards the use by belligerent military aircraft of wireless telegraphy stations (or other signalling apparatus) erected on neutral territory, the provisions of Articles 3, 8, and 9 of the Hague Convention on the Rights and Duties of Neutral Powers and Persons in Land War, and of Article 5 of the Hague Convention on the Rights and Duties of Neutral Powers in Maritime War, are applicable.

See Fauchille, Article 19, and page 102, *supra*.

The terms of the articles referred to are given in Appendix VIII.

ARTICLE 18.—Neutral aircraft found by a belligerent in the territory or territorial waters of the enemy may be treated as private enemy aircraft.

The release of such aircraft, with or without conditions, may, however, be made the subject of arrangement between the belligerent and the Government of the neutral owner's State.

See pages 80–82, *supra*.

ARTICLE 19.—An aircraft consigned by a neutral contractor, by way of the air, to the territory or territorial waters of a belligerent, or to territory occupied by his troops, or to his fleet or aircraft, may be seized by the other belligerent (but must be restored, without indemnity, at the peace), provided either

(1) that it is designed or fitted for use in war, or, if it is not so designed or fitted,

(2) that it is proved to be destined for the use of the armed forces or of a Government Department of the enemy.

Such aircraft may only be destroyed if imperative military necessity demands, and in this case the compensation to be paid shall be arranged at the peace.

See Fauchille, Articles 22, 23 and 24, and pages 82–84, *supra*.

ARTICLE 20.—The provisions of Articles 2, 6, 7, and 8 apply also to neutral aircraft.

The crews of such aircraft may be brought before the courts in the same circumstances as private enemy airmen (see Articles 2 and 8), but they shall not be liable to be made prisoners of war by a belligerent unless they are nationals of the other belligerent State.

Such members of the crews of private enemy aircraft confiscated under Article 6, or sequestrated under Article 4, as are nationals of a neutral State, shall not be made prisoners of war, provided they give a formal promise in writing not to return to the enemy country nor to serve the enemy in any way while the war lasts.

Their names shall be notified by the belligerent captor to the other belligerent, who is forbidden knowingly to employ them.

See the references under Articles 2, 6, and 7, and the general remarks on pages 93–96, *supra*; also Fauchille, Articles 25–27.

APPENDIX II

M. Paul Fauchille's Project of a Convention for Aerial Law, with Notes, in Square Brackets, explaining the References to the various Conventions, etc.

Part I. contains the rules for Peace. The only provisions of this part which need be mentioned here are the following :—

ARTICLE 1. – A military aircraft is an aircraft assigned by the State to a military duty and placed under the command of an officer, in uniform, of the land or sea forces. Every military aircraft must bear the distinctive sign of its character, attached in a visible manner to its envelope.

ARTICLE 4.—The national flag will indicate the public character of aircraft. In the case of military aircraft, this flag will be in the form of a pennant (*une flamme*).

ARTICLE 7.—Aerial circulation is free; but the underlying States retain the rights necessary for their self-preservation, that is, for their own security and that of the persons and property of their inhabitants.

ARTICLE 8.—To ensure their right of self-preservation, States may close certain regions of the atmosphere to circulation, *e.g.*, the atmosphere above and around forti-

fied works. The parts of the atmosphere closed to circulation will be marked by signs visible for aeronauts.

ARTICLE 9.—The circulation of aircraft is entirely free above the open sea and unoccupied territories.

ARTICLE 10.—Military aircraft can only pass the frontiers of their country with the authority of the State in whose atmosphere they wish to circulate or in whose territory they wish to land.

Part II.—War

Chapter I

THE THEATRE OF AERIAL WAR

ARTICLE 1.—Belligerent States have the right to carry out warlike acts in any and every part of the atmosphere above their several territories, above the open sea, and above the sea bounding their coasts.

They are forbidden to carry out hostile acts, capable of causing the fall of projectiles or of causing damage generally, above the territories of neutral States, at whatever height, and also in the neighbourhood of these States within a radius determined by the force of the cannon of their aircraft.

A belligerent's military aircraft, and also his public non-military aircraft, may not circulate above a neutral State except with the latter's authority. But both public and private aircraft are forbidden to remain above a neutral country within a certain radius of the other belligerent's frontier. The circulation of aircraft in war-time is subject to the same restrictions as during peace.

Chapter II

THE RELATIONS OF BELLIGERENTS "INTER SE"

ARTICLE 2.—Privateering is forbidden in aerial as in maritime war.

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Belligerents may, however, incorporate in their military forces, private aircraft and their crews, on condition that they are placed under the control of a duly commissioned officer and carry a distinctive, external sign of their character.

ARTICLE 3.—The conversion of private aircraft into military aircraft may be made during war in the territory or in the territorial waters of the State to which they belong, in the territory occupied by the troops of that State, in the open sea, and in the atmosphere not situated above a neutral State, under the conditions laid down in the Hague Convention of 18th October, 1907, relative to the conversion of merchant ships into ships of war.

[The Hague Convention referred to left unsolved the question of conversion of merchant vessels into fighting ships on the high seas, but drew up rules for the conversion within the converting State's territorial waters, as follows:—(1) the converted ship must be under the direct authority, immediate control and responsibility of the State whose flag it flies; (2) it must have the external distinguishing marks of a war-ship; (3) the commander must be a duly commissioned officer and his name must appear in the Navy List; (4) the crew must be subject to military discipline; (5) the ship must observe the laws and customs of war; (6) it must be entered in the list of commissioned vessels as soon as possible. All the nations represented at the Hague have accepted these rules, except the United States, China, Dominica, Nicaragua, and Uruguay; and Turkey made a reservation.]

The converted aircraft will preserve their military character during the whole period of hostilities and cannot be reconverted into private aircraft during that period.

ARTICLE 4.—The terms of the 1st Section, Chapter II, and of the 2nd Section, Chapters I and III, of the Hague *Règlement* of 18th October, 1907, concerning the

Laws and Customs of War on Land, besides those expressly laid down in the following articles, will apply, as far as possible, to aerial war.

[The chapters of the Hague *Règlement* referred to relate to the treatment of prisoners of war, to the means which may be employed of injuring the enemy, and to flags of truce. Of special interest in connection with air fighting, the following points from the sections referred to may be mentioned :—

Belligerents may not (1) use poisoned arms, (2) resort to treachery, (3) refuse quarter, (4) use arms or projectiles likely to cause unnecessary suffering, (5) make improper use of the enemy's flag, uniform, or insignia, or of the Geneva flag, (6) destroy or seize enemy property unless the exigencies of war imperatively demand it.

The bearer of a flag of truce is inviolable, but the enemy commander is not bound to receive him in all circumstances and can, in any case, take all steps necessary to prevent the bearer from obtaining information. The *parlementaire* loses his right of inviolability if proved to have use his privileged position to instigate or commit an act of treachery.]

ARTICLE 5.—**In accordance with the 2nd and 3rd Declarations of the Hague of 29th July, 1899, the discharge from aircraft of projectiles, the sole object of which is the diffusion of asphyxiating or deleterious gases, or of bullets which expand or flatten easily in the human body, is forbidden.**

ARTICLE 6.—**The bombardment by aircraft of towns, villages, habitations or buildings which are not defended is forbidden.**

The rules established by the Hague Conventions of 18th October, 1907, relative to Sieges and Bombardments by Land or Naval Forces, are applicable to aerial war.

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[See Appendix VII for the Convention on Naval Bombardments, which is fuller than the Hague *Règlement* for land bombardments, also given in App. VII.]

ARTICLE 7.—Aircraft can only be considered suspected of espionage if, acting clandestinely or under false pretences and thus dissimulating their operations, they obtain, or seek to obtain, information, above the territory or territorial waters of a belligerent, or above territory occupied by his troops, or, in the open sea, above one of his squadrons or ships of war, and, generally, in the zone of his operations, with the intention of communicating it to the hostile party.

It is consequently a principle that soldiers, not in disguise, employed on scouting duty in aircraft, and individuals dispatched in aircraft to carry despatches and in general to maintain communication between the various parts of an army or of a territory, are not considered spies.

ARTICLE 8.—The public aircraft of a belligerent State, though not appertaining to the military service, are liable to seizure and confiscation.

ARTICLE 9.—The private aircraft of the enemy may be seized by a belligerent above his own or the enemy's territory or territorial waters, and above the open sea, but they must be restored at the peace without indemnity. Any merchandise, even belonging to the enemy, found on board such aircraft, is not seizable.

The foregoing dispositions do not modify the right of confiscation which a belligerent possesses in virtue of the rules relating to blockade and contraband of war, and generally, in the case of private enemy aircraft performing hostile acts or being employed in a military task.

[The first paragraph of Article 9 is M. Fauchille's attempt to reconcile by a compromise the divergent views expressed by the jurists whom he consulted

when framing his *Rapport*. MM. Meili, Meurer, Kaufmann, and Albéric Rolin desired to exempt private enemy aircraft from seizure and destruction. M. Renault and Professor Holland considered it more logical to apply the (non-coded) rule of maritime warfare which permits their seizure and destruction. This latter rule was the subject of discussion at the Hague Conference of 1907; the United States, Germany, Austria, Italy and other Powers were in favour of declaring the absolute immunity from capture of private property at sea, but as this view was opposed by Great Britain, France, Russia, Japan and other States, the Conference arrived at no agreement, and therefore the old "common law" rule of International Law which subjects an enemy's merchant vessels to capture remains in force. In land war enemy private property generally is exempt from seizure or destruction except in the case of imperative military necessity. M. Fauchille's article is a "splitting of the difference" between the rules of land and naval war; enemy aircraft, being of their nature especially capable of employment as an arm of war, are liable to seizure, but not to confiscation, and they must be restored to the owners after peace.]

ARTICLE 10.—The validity or nullity of the acquisition of neutral nationality by enemy aircraft is, in accordance with the dispositions of Chapter V of the Declaration of London of 26th February, 1909, dependent on the moment at which the transfer has been effected and the conditions on which it has been carried out.

[The Declaration of London has not been ratified by the British Government, but the rules laid down therein regarding the transfer of belligerent merchant ships to a neutral flag would probably be held to be principles of International Law (un-coded) and to be applicable to any such cases which actually arose in

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maritime war. Broadly speaking, one may say that transfer to a neutral flag is valid unless there is evidence that its object was to evade the consequences to which enemy ships are exposed; and the length of time before the outbreak of war at which the transfer was effected, the consideration whether the bill of sale is or is not on board the vessel, and the conditions of the sale, whether unconditional, complete, and legally executed, or not, are all of importance in deciding the validity or otherwise of the transfer. If the transfer is made during war-time, there is a presumption that its object was to avoid the risks to which a belligerent's merchant vessels are subject and the "onus" rests on the neutral owner to rebut this presumption.]

ARTICLE 11.—The fact whether an airship or aeroplane is enemy or neutral is shown by the distinctive sign of its nationality, which it has the right to carry.

ARTICLE 12.—When private enemy aircraft or public non-military enemy aircraft are seized by a belligerent, the captain and crew, whether subjects of the enemy State or of a neutral State, are not made prisoners of war, but must be left at liberty under the conditions provided for in Chapter III. of the Hague Convention of 18th October, 1907, relative to Certain Restrictions upon the Exercise of the Right ot Capture in Maritime War.

[The Hague Convention referred to provides that when an enemy merchant-ship is captured, its captain, officers, and crew, (1) if subjects of a neutral State, are left at liberty, but the captain and officers (the crew are excused) must undertake in writing not to serve on an enemy ship while the war lasts; (2) if subjects of the enemy State, *all* must promise in writing not to engage, while hostilities last, in any service connected with the operations of the war.]

ARTICLE 13.—The destruction of private enemy aircraft or of public enemy aircraft is only permissible

under the exceptional circumstances of the aircraft acting as, in fact, military aircraft, or resisting the legitimate exercise of the right of capture; and the destruction cannot be carried out until after a special summons has been made.

ARTICLE 14.—Belligerents possess the right to capture enemy aircraft, private or public, descending on their territory whether by accident or forced descent.

[See the comment under Article 27, *post*.]

ARTICLE 15.—The private aircraft of a belligerent which happen to be within the enemy's territory at the outbreak of hostilities, and aircraft which quitted their last port of departure before the commencement of hostilities and arrived within hostile territory without knowing of the existence of hostilities, can only be seized under the conditions named in Article 9 if no "days of grace" have been granted for their departure, or if, such "days of grace" having been granted, advantage has not been taken thereof. "Days of grace" cannot be granted to private enemy aircraft, the construction of which shows that they are intended to be transformed into war aircraft.

Private enemy aircraft which quitted their last port of departure before the commencement of hostilities and are encountered, in space, ignorant of the existence of hostilities, may be seized like all other private enemy aircraft.

Public non-military aircraft may receive the benefit of the "days of grace" in the same circumstances as private aircraft.

[The Hague Convention relative to the Status of Enemy Merchant-ships at the Outbreak of Hostilities, records that it is *desirable* (it imposes *no obligation* in the matter) that a belligerent should allow the free departure of enemy merchant-ships in his ports at the outbreak of hostilities, either immediately or after a sufficient period "of grace"; and, as regards merchant-

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ships met at sea in ignorance of a state of war, the Convention declares that these cannot be confiscated, but may be detained by the belligerent encountering them, subject to restoration at the end of the war ; or they may even be requisitioned or destroyed by him, provided the owners are indemnified. It is expressly stated that the Convention does not affect merchant-ships *dont la construction indique qu'ils sont destinés à être transformés en bâtiments de guerre.* M. Fauchille's article is the application of these rules to air war, his provision as to ships encountered on the high seas in ignorance of hostilities being simpler in form than that in the Convention because of his general underlying principle that private enemy aircraft cannot, like merchant-ships in war, be confiscated outright but only seized subject to subsequent restoration.]

ARTICLE 16.—Aircraft charged with scientific or philanthropic missions are exempt from seizure, under the conditions named in Chapters I. and II. of the Hague Convention of 18th October, 1907, relative to certain Restrictions on the Exercise of the Right of Capture in Maritime War.

[The Convention referred to exempts from capture at sea the postal correspondence of neutrals or belligerents, official or private, found on an enemy or neutral ship ; but correspondence to or from a blockaded port, found on a ship violating the blockade, is not exempt. It also exempts vessels employed in coast fisheries, small boats engaged in local trade and vessels charged with religious, scientific and philanthropic missions. M. Fauchille's original draft contained an analogous provision regarding postal correspondence found in aircraft, but he deleted this in view of M. Renault's objection that the carrying of mails by aircraft would be, not a regular service like that of mail-ships, but,

very often, a special service of a distinctly hostile character.]

ARTICLE 17.—As regards the treatment of sick and wounded, the provisions of the Hague Convention of 18th October, 1907, for Adaptation of the Principles of the Geneva Convention to Maritime War, are applicable also to aerial war, so far as possible.

The wounded and sick soldiers of a belligerent deposited by aircraft upon a neutral State's territory with the consent of the local authorities, must, in default of an arrangement to the contrary between the neutral and the belligerents, be guarded by the neutral State so as to prevent their taking part again in the operations of the war. The expenses of maintaining them in hospital and of interning them will be borne by the State to which the wounded and sick belong.

[It is impossible to give any satisfactory *précis* of the rules of the Conventions referred to in the first sentence; reference should be made to the terms of the Conventions.]

ARTICLE 18.—An army which invades or occupies a hostile territory may seize aircraft of enemy nationality, even if belonging to private persons; but, in this latter case, the aircraft must be restored and indemnities for them regulated at the peace, in conformity with Article 53 of the Hague *Règlement* of 18th October, 1907, on the Laws and Customs of War on Land.

[The article referred to contains a similar provision regarding "all appliances, whether on land, at sea, *or in the air*, adapted for the transmission of news or for the transport of persons or goods, apart from cases governed by maritime law, depots of arms, and, generally, all kinds of war material."]

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Chapter III

The Relations of Neutrals and Belligerents

ARTICLE 19.—The military aircraft of the belligerents which enter neutral territory must not remain there more than twenty-four hours, unless prevented by damages or the state of the atmosphere.

If the aircraft of the two belligerent parties happen to be simultaneously at the same place in this territory, at least twenty-four hours must be allowed to elapse between the departure of the aircraft of the one belligerent and the aircraft of the other. The order of their departure is determined by the order of their arrival, unless, in the case of the aircraft arriving first, there is an admissible reason for prolonging the stay.

[There is a similar provision in the Hague Convention relating to Neutral rights and Duties in Maritime War.]

Belligerent aircraft must not do anything within neutral territory which might augment their military power, and their presence must not in any way prejudice the interests of the neutral State; the only acts which they may perform are those which humanity cannot forbid and which are indispensable for enabling them to reach the nearest point in their own country or in a country allied to them during the war.

[There is a similar provision in the Convention relating to Neutral Rights and Duties in Maritime War, which provides that belligerent war-ships may, in neutral ports, only carry out such repairs as are absolutely necessary to make them seaworthy and it is for the local authorities of the neutral power to decide what repairs are necessary. They must not use neutral waters to replenish or increase their war material or armament or to complete their crews; and they

may only revictual therein to bring up their supplies to the peace standard. They can only take in enough coal to allow them to reach their own country, but this rule is modified by an important proviso that they may fill up their fuel bunkers in neutral countries which have adopted this method of determining the amount of fuel to be supplied ; and they cannot, having coaled in a neutral port, replenish their coal supply in a port of the same neutral Power within three months. Great Britain has not accepted the terms of the Convention which allow a belligerent warship to bring up its supplies of provisions to the peace standard and to fill up its bunkers with coal, in a neutral port ; the British rule having always been and still being that the quantity of provisions or fuel taken on board in neutral waters should not exceed that which is necessary to enable the belligerent ship to reach the nearest port in its own country.]

The principles of the Hague Convention of 18th October, 1907, relating to Neutral Rights and Duties in Maritime War, are generally applicable to aerial war.

[In addition to the provisions referred to above, the Hague Convention forbids belligerents to use neutral waters as a base of operations against their adversaries, and, in particular, to erect wireless telegraphy stations, or any signalling apparatus, therein. Neutral Powers must not themselves supply a belligerent with war material of any kind, but they need not prevent the export or transit, on behalf of a belligerent, of war material or anything of use to his fleet. They must prevent the fitting out or arming of vessels to serve against a belligerent Power. Their neutrality is not affected by the mere passage through their territorial waters of war-ships or prizes belonging to belligerents, and they may allow a belligerent war-ship to employ their licensed pilots. A prize can only be brought

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into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions, and must leave as soon as possible, otherwise the neutral Power must release the prize, with its officers and crew, and intern the prize crew. A neutral State *may*, however, allow prizes to enter its ports, whether under convoy or not, when they are brought there to be sequestrated pending the decision of a Prize Court, and in such a case the prize crew is left at liberty. The rule laid down in the last sentence has not been accepted by Great Britain, which holds that neutral prizes must either be taken into the captor's ports or released. Japan, also, has declined to accept the rule. The Convention further provides that if a belligerent ship refuses to leave a neutral port when ordered, the neutral Power may take measures to render the ship incapable of putting to sea so long as the war lasts, and may detain the officers and crew during the same time.]

ARTICLE 20. — The aerial navigation of neutral countries is prohibited in all parts of the atmosphere dominating the territory of the belligerent States, as well as within a radius of 11,000 metres from their frontier.

Except in the case of *force majeure*, aircraft disobeying this prohibition will be confiscated if espionage is not proved against them [*in which case the severer punishment which the spy incurs would be inflicted.*]

[The 11,000 metre limit is taken as representing the farthest range at which fortifications could be distinguished by powerful glasses.]

ARTICLE 21.—In case of a blockade with an effective area of more than 11,000 metres, neutral aircraft may not approach any point in this area even if more than 11,000 metres from the enemy's frontier.

Neutral aircraft in a blockaded port may not leave it.

The rules formulated by the Declaration of London of

26th February, 1909, as to blockade, are applicable in aerial as in maritime war.

[The rules referred to are, broadly, that a blockade, to be binding, must be effective—this was already provided for in the Declaration of Paris of 1856—but it remains effective even if the blockading force is temporarily withdrawn in consequence of stress of weather. A blockade must be impartially applied to all flags. In circumstances of distress a neutral vessel may enter and leave a blockaded place on condition that she has neither discharged nor shipped any cargo there. A blockade must be "declared" by the blockading State, or its naval authorities, and "notified" (1) to neutral Powers, (2) to the local authorities of the blockaded port. Neutral vessels' liability for breach of blockade is contingent on their knowledge, actual or presumptive, of the blockade; and such knowledge is presumed where the vessel has left a neutral port after the notification of the blockade to the Power to which such port belongs. If the vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, an officer of the blockading force must notify the vessel and enter the notification in the vessel's log-book. Neutral vessels may only be captured for breach of blockade within the area of operations of the blockading warships. The blockading forces must not bar access to neutral ports or coasts; and whatever may be the ulterior destination of a vessel or her cargo, she cannot be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port. A vessel which has broken blockade outwards, or attempted to break it inwards, is liable to capture only for so long as she is pursued by a ship of the blockading force. Vessels found guilty of blockade-breaking are condemned, and so is their cargo unless it is proved that at the time of the shipment the shippers neither knew

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nor could have known of the intention to break the blockade.]

ARTICLE 22.—Articles constituting contraband of war may be confiscated on board neutral aircraft as well as on board enemy aircraft.

ARTICLE 23.—As regards the determination of articles constituting contraband of war and the conditions in which they may be seized, the rules laid down in the Declaration of London of 26th February, 1909, Chapter II., shall be followed.

[The rules referred to divide shipments into three classes—(1) "absolute contraband," *i.e.*, arms, explosives, military equipment, and other articles and materials used exclusively for war; (2) "conditional contraband," *i.e.*, articles and materials *ancipitis usus*, such as foodstuffs, forage, clothing, vehicles, etc., which may be used either for warlike or peaceful purposes; (3) articles and materials which are clearly, in their existing state, not utilisable for war; such as raw cotton or wool, textile raw materials generally, hides, manures, ores, chinaware glass, paper, agricultural and other machinery, etc., (1) may be seized if shown to be ultimately destined to territory belonging to or occupied by the enemy; (2), only if shown to be destined for his armed forces or one of his departments of State; (3) can never be seized. Articles of an exclusively military nature may be added to the list of articles which are "absolute contraband," and those *ancipitis usus* to the list of "conditional contraband," provided, in both cases, that all the Powers are notified.]

ARTICLE 24.—Among the articles of "conditional contraband" which may be declared confiscable if destined for the use of the armed forces or of a Government department of the enemy, the following may be classed, viz., aircraft, their distinctive component parts

and accessories, articles and materials of the special character of aircraft stores.

[The articles and materials referred to are included as "conditional contraband" in Article 24 of the Declaration of London.]

ARTICLE 25.—The provisions of Chapter III. of the Declaration of London of 26th February, 1909, relative to unneutral service at sea, shall be applicable to neutral aircraft.

There is a presumption of unneutral service, justifying capture, against neutral aircraft circulating above belligerent States.

[Chapter III. of the Declaration of London provides, generally, that a neutral vessel shall be confiscated if she is on a voyage specially undertaken to carry individuals in the armed services of the enemy, or to transmit intelligence in the enemy's interest, or if, to the knowledge of the owner, master or charterer, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the enemy's operations. She is also liable to confiscation when acting, in effect, as an enemy public vessel, as by (1) taking a direct part in hostilities, (2) being under the orders or control of a Government agent on board, (3) being in the exclusive employment of the enemy Government, (4) being devoted exclusively, at the time, to the transport of enemy troops or the transmission of intelligence in the enemy's interest.]

ARTICLE 26.—Neutral aircraft may be destroyed under the same conditions as belligerent aircraft.

ARTICLE 27.—Neutral aircraft descending in belligerent territory, owing to accident or "forced descent," may be seized and confiscated in the cases and subject to the conditions specified in the preceding articles.

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[The object of this article, as of Article 14, the corresponding provision as to private enemy aircraft, is to make it clear that aircraft "on the wing" and aircraft which have come to ground are subject to the same rules as regards seizure or confiscation. "It would be illogical," says M. Fauchille, "when an aircraft has reached the ground owing to some mischance, to remove it from the domain of aerial war and to subject it to that of land war."]

ARTICLE 28.—**The subjects of a neutral State shall be treated like those of the belligerent States as regards aircraft belonging to them in the territories of the belligerents.**

["What I have in view in this article," says M. Fauchille, "is the case of neutral subjects who are proprietors of aircraft in a belligerent's territory. The belligerent must have power to requisition aircraft belonging to neutral nationals as well as aircraft belonging to his own subjects, and when a territory is occupied or invaded by the hostile army, the latter must have the right to take possession of the machines of neutrals as well as those of the enemy; a premium should not be put on neutrality."]

Chapter IV

AERIAL PRIZES

ARTICLE 29.—**The adjudication of aerial prizes is subject to the same rules as the adjudication of maritime prizes.**

If the seizure of an aircraft or its cargo has not been upheld by the prize courts, or, if, without the matter being brought before the courts, the seizure has not been maintained, the parties interested have a claim to damages, unless there has been sufficient justification for the seizure of aircraft and cargo.

[M. Fauchille's Cope

In the case of destruction of an aircraft, unless the captor can show that he acted in the circumstances referred to in Article 13, he is bound to indemnify the persons interested, and it is not necessary to inquire whether the seizure was valid or not.

[In maritime warfare, the adjudication of prizes is exercised in the first instance by the Prize Courts of the belligerent captor, from which, however, there is an appeal to the International Prize Court established by the Hague Convention of 1907, but only where a neutral State or individual is concerned in some way, or where, if the seizure affects a national of the enemy State, the seizure is alleged to be a violation of an agreement between the belligerent States or of an enactment issued by the captor.

The Declaration of London (which, as already stated, has not been ratified by Great Britain) provided for the destruction of neutral prizes being permitted if the vessels would be liable to condemnation, on the facts of the case, and if it would endanger the safety of the capturing war-vessels to take the prizes into a port for adjudication. This provision is contrary to the British practice, under which the destruction of neutral prizes is considered unjustifiable under any circumstances; if the prize cannot be brought into port and condemned, she should be released. But *enemy* prizes may be destroyed, according to Great Britain's view of International Law, if their destruction is necessitated by exigencies of war.]

(*Annuaire de l'Institut de Droit international*, 1911, Vol. 24; *Revue de la locomotion aérienne*, July—August 1911.)

APPENDIX III

Code proposed by M. Edouard d'Hooghe, President of the International Juridicial Committee of Aviation

M. d'Hooghe's proposed code is practically identical with M. Fauchille's, from which, indeed, nearly all of his articles are simply transcribed. The only important differences are due to M. d'Hooghe's different conception of the *status* of the atmosphere. Unlike M. Fauchille, he regards the atmosphere, not as free, but as a *res communis*, "which is in all its parts subject to the common sovereignty of all the 'persons' (States) of International Law." He would not, therefore, accept Articles 7 and 8 of M. Fauchille's code for Peace, because, in his view, the separate States cannot legislate for the atmosphere overlying their territory, the community of Powers, in agreement, being alone entitled to make laws for their common domain. As regards the War Code, M. d'Hooghe replaces Articles 1, 3, 20, and 22 of M. Fauchille's code by the articles given below, and he inserts an article after M. Fauchille's No. 25; otherwise the two codes are the same.

[M. d'Hooghe's Code

ARTICLE 1.—Belligerent States must abstain from acts of hostility above the territory and territorial waters of neutral States. Acts of hostility include observation of enemy territory from the atmosphere of a neutral State.

The circulation of belligerent aircraft, military or otherwise, cannot be forbidden [*Sc.* by neutral States].

ARTICLE 3.—The conversion of private into military aircraft may be carried out in any part of the atmosphere. It is final, and the inverse conversion is not allowed during the war.

[M. Fauchille's rule forbidding conversion over neutral territory is deliberately omitted by M. d'Hooghe, in accordance with his first principle.]

ARTICLE 20.—The aerial navigation of neutral countries remains free. Neutral aircraft circulating over belligerent territory can only be confiscated in the case of espionage.

ARTICLE 22.—Articles constituting contraband of war may be confiscated on board neutral aircraft as well as on board enemy aircraft. The postal correspondence of belligerents on board neutral aircraft and that of neutrals on board enemy aircraft are equally inviolable. Private enemy correspondence is inviolable on board enemy aircraft.

[*See* the comment following Article 16 of M. Fauchille's draft.]

Article following on ARTICLE 25.—Belligerents may, above their own or the enemy's territory, oblige private neutral aircraft to land for the purpose of "visit." Neutral aircraft under convoy of their flag are exempt from "visit."

[M. Fauchille's original draft contained an article which read: "Belligerents have the right to 'visit'

M. d'Hooghe's Code]

aircraft under the same conditions as ships. Neutral aircraft under convoy of their flag are exempt from 'visit.'" This article was omitted by M. Fauchille from his final draft in view of the objections raised by the majority of his colleagues, who pointed out that there were practical difficulties in the way of "visit" in the case of aircraft. M. d'Hooghe's article represents an attempt to meet these difficulties, while he retains M. Fauchille's second sentence.]

(E. d'Hooghe, *Droit aérien*, Paris, Dupont.)

APPENDIX IV

Code proposed by Professor L. Von Bar

ARTICLE 1.—The use of airships, balloons or aeroplanes as a means of destruction is prohibited.

ARTICLE 2.—As an exception to the above provisions:—

(a) Enemy military airships, balloons, or aeroplanes may always defend themselves if fired upon by cannons from the land or from ships;

(b) Aerial engagements are allowed:—

(1) if there is a naval engagement and the airships, balloons, or aeroplanes are not distant more than twenty kilometres from the scene of the engagement;

(2) in the territorial waters of the belligerents, within a blockaded zone;

(3) in the aerial space enveloping the belligerents' territories.

ARTICLE 3.—Private enemy airships, etc., may not be captured in the air, unless they enter voluntarily the atmosphere overlying the enemy's territory or a zone of blockade, or unless it is a case of carriage of contraband under Article 4.

ARTICLE 4.—The seizure and confiscation of neutral airships or their cargoes as contraband are forbidden, except when they are immediately engaged in affording assistance to a blockaded coast-line or port, or to the enemy army or fleet in the theatre of war.

Prof. von Bar's Code]

ARTICLE 5.—In the exceptional cases referred to in Article 4, the rules as to maritime prizes will be applied.

ARTICLE 6.—Private enemy airships are forbidden to enter the atmosphere of the enemy State.

ARTICLE 7.—A belligerent *may* forbid neutral ships to enter the atmosphere overlying his territory.

ARTICLE 8.—Neutral airships must not be fired upon without previous warning, and must not be fired upon if compelled by accident to land.

Annuaire de l'Institut de Droit international, 1911, Vol. 24, Paris (Pedone), pp. 132–133.

APPENDIX V

(1) Rules adopted at the Session of 1911 of the Institute of International Law

ARTICLE 1.—Aircraft are distinguished as public or as private aircraft.

ARTICLE 2.—Every aircraft must have a nationality and one only. This nationality will be that of the country in which the aircraft has been registered (*immatriculé*).

Every aircraft must bear special marks by which it can be identified. The State in which registration is applied for will determine the persons in whose case and the conditions under which registration will be allowed. The State registering an aircraft belonging to an alien cannot, however, claim to afford protection to such aircraft in the territory of the owner's State, as against any laws of that State forbidding its nationals to have their aircraft registered in foreign States.

ARTICLE 3.—International aerial circulation is free, subject to the right of States to take certain steps, which shall be fixed, to ensure their security and that of the persons and property of their inhabitants.

ARTICLE 4.—Aerial war is allowed, but only on the condition that it does not present for the persons or property of the pacific population greater dangers than land or sea war.

(*Annuaire de l'Institut de Droit international.* Vol. 24. 1911.)

(2) Extract from the Report of the Committee upon Aviation of the International Law Association (Madrid, 1913).

"It appears to the Committee impossible to contend that according to existing International Law the air space is free; nor do they think that States would be willing to accept or to act on that view of the law. But they are of opinion that subject to such safeguards as subjacent States may think it right to impose, aerial navigation should be permitted as a matter of comity.

"There is no reason to anticipate that States will interfere with the passage of foreign airships through the air above their territories in an unreasonable manner, any more than they have interfered with the passage of foreign vehicles through their territories or of foreign vessels through their territorial waters. Indeed any action of this character must necessarily be prevented by considerations of reciprocal interest.

"The Committee therefore submit the following resolutions:—

"1. It is the right of every State to enact such prohibitions, restrictions, and regulations as it may think proper in regard to the passage of aircraft through the air space above its territories and territorial waters.

"2. Subject to this right of subjacent States, liberty of passage of aircraft ought to be accorded freely to the aircraft of every nation."

(*Report of Madrid Conference of International Law Association*, 1913, London, R. Flint and Co., pp. 532–533.)

APPENDIX VI

Code Proposed by M. Le Moyne

ARTICLE 1.—Aerial war is permitted. It is subject, as far as possible, to the rules governing maritime and land warfare.

ARTICLE 2.—The theatre of aerial war is the atmosphere enveloping:—

(a) the territory of the belligerents;
(b) their territorial waters;
(c) the open sea.

ARTICLE 3.—In war time, all the aircraft of belligerents are forbidden to enter the atmosphere and territory of neutral States, and all neutral aircraft are forbidden to circulate above the territory and territorial waters of the belligerents.

ARTICLE 4.—Upon the opening of hostilities and during their course, all private or public non-military aircraft (*les aéronefs publics civils*) of the belligerents, whatever their normal destination, may be seized if in the theatre of war, whether there through accident or forced descent.

All aircraft seized under the preceding paragraph, will be restored at the peace, with payment of compensation in the case of private, but not of public non-military aircraft.

Any passengers in such aircraft will be left at liberty without any conditions.

A captor may destroy aircraft opposing the legitimate exercise of the right of seizure, but only after non-compliance with a previous summons.

ARTICLE 5.—Upon the opening of hostilities, the belligerent States will take such measures as they consider

M. Le Moyne's Code]

necessary as regards neutral aircraft in their territories.[1]

ARTICLE 6.—Aircraft can only be considered suspected of espionage if, acting clandestinely or on false pretences and thus dissimulating their operations, they obtain or seek to obtain information above the territory or territorial waters of a belligerent, or above territory occupied by his troops, or, in the open sea, above one of his squadrons or warships, and generally in the zone of his operations, with the intention of communicating it to the hostile party.

ARTICLE 7.—The neutral or enemy character of an aircraft is determined by the distinctive mark of nationality which it is entitled to bear.

ARTICLE 8.—The military aircraft of the belligerents which enter the territory of a neutral State are seized. They are restored at the conclusion of peace without indemnity. The crew are interned until the end of the war.

ARTICLE 9.—Amongst the articles of "conditional contraband" which may be declared seizable, if destined for the use of the armed forces or of a Government department of the enemy, are aircraft and their distinctive component parts, together with accessories, articles, and materials recognisable as intended for use in connection with aircraft.

(Le Moyne, *Le droit futur de la guerre aérienne*, Nancy, 1913.)

[1] The intention of this Article is to provide that neutral aircraft which happen to be in a belligerent's territory when war breaks out should be left at liberty, but may be dealt with in such a way as the national security of the belligerent demands (as, for instance, by being sent back to their country by rail instead of by air). In a work on Aerial Law, Lieutenant Grovalet had proposed that the belligerent should have the right to seize such aircraft and use them for his operations. M. Le Moyne refuses, properly, to admit such a belligerent right, which could only be justified if, as in the case of railway material under the Hague Convention on Neutrality in Land War, the neutral State were given the right to seize and use belligerent aircraft to a corresponding extent: a right which belligerents would certainly not recognise. One doubts, however, whether M. Le Moyne's Article, as it stands, is sufficiently explicit as to his intention in framing it.

APPENDIX VII

Bombardment

(1) Hague Convention respecting Bombardment by Naval Forces in Time of War

ARTICLE 1.—The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden.

A place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbour.

ARTICLE 2.—Military works, military or naval establishments, depots of arms or war *matériel*, workshops or plant which could be utilised for the needs of the hostile fleet or army, and the ships of war in the harbour are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander shall take all due measures in order that the town may suffer as little harm as possible.

ARTICLE 3.—After due notice has been given, the bombardment of undefended ports, towns, villages, dwellings, or buildings may be commenced, if the local authorities, after a formal summons has been made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question.

These requisitions shall be in proportion to the resources of the place. They shall only be demanded in the name of the commander of the said naval force, and they shall, as far as possible, be paid for in cash ; if not, they shall be evidenced by receipts.

ARTICLE 4.—Undefended ports, towns, villages, dwellings, or buildings may not be bombarded on account of failure to pay money contributions.

ARTICLE 5.—In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large stiff rectangular panels divided diagonally into two triangular portions, the upper portion black, the lower portion white.

ARTICLE 6.—If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.

ARTICLE 7.—The giving over to pillage of a town or place, even when taken by assault, is forbidden.

ARTICLE 8.—The provisions of the present Convention are only applicable between Contracting Powers, and only if all the belligerents are parties to the Convention.

(2) Articles of the Hague *Règlement* relative to Bombardment in Land War

ARTICLE 25.—The attack or bombardment, by any means whatever, of undefended towns, villages, dwellings, or buildings is forbidden.

ARTICLE 26.—The officer in command of an attacking force must do all in his power to warn the authorities before commencing a bombardment, except in cases of assault.

ARTICLE 27.—In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

APPENDIX VIII

Belligerents and Neutral Wireless Installations

Extract from the Hague Convention respecting the Rights and Duties of Neutral Powers and Persons in War on Land, 1907

ARTICLE 3.—Belligerents are also forbidden:—

(a) To instal on the territory of a neutral Power a wireless telegraphy station or any apparatus intended to serve as a means of communication with belligerent forces on land or sea;

(b) To make use of any installation of this kind established by them before the war on the territory of the neutral Power with an exclusively military object and not already opened for the service of public messages.

ARTICLE 8.—A neutral Power is not bound to forbid or restrict the employment on behalf of belligerents of telegraph or telephone cables or of wireless telegraphy apparatus whether belonging to it, or to companies or to individuals.

ARTICLE 9.—Every restrictive or prohibitive measure taken by a neutral Power with regard to the matters referred to in Articles 7 and 8 must be applied impartially to the belligerents. The neutral Power shall ensure that the same obligation is respected by companies or in-

dividuals owning telegraph or telephone cables or wireless telegraphy apparatus.

Extract from the Hague Convention respecting the Rights and Duties of Neutral Powers in Maritime War, 1907

ARTICLE 5.—Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and especially to instal there wireless telegraphy stations or other apparatus intended to serve as a means of communication with belligerent forces on land or sea.

APPENDIX IX

British Aerial Navigation Acts, 1911 and 1913, and Extract from the British Army Act

I

An Act to provide for the protection of the public against dangers arising from the Navigation of Aircraft

(*2nd June*, 1911.)

Be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Power to prohibit navigation of aircraft over prescribed areas

1.—(1) A Secretary of State may, for the purpose of protecting the public from danger, from time to time by order prohibit the navigation of aircraft over such areas as may be prescribed in the order,[1] and, if any person navigates an aircraft over any such area in contravention of any such order, he shall be guilty of an offence under this Act, unless he proves that he was

[1] The prohibited areas are given in Schedule I of "Statutory Rule and Order No. 228 of 1913" (Home Office). They are defences, dockyards, railway stations of strategic importance, etc

compelled to do so by reason of stress of weather or other circumstances over which he had no control.

(2) Any such order may apply either generally to all aircraft or to aircraft of such classes and descriptions only as may be specified in the order, and may prohibit the navigation of aircraft over any such prescribed area either at all times or at such times or on such occasions only as may be specified in the order, and either absolutely or subject to such exceptions or conditions as may be so specified.

Penalties for offences

II.—(1) If any person is guilty of an offence under this Act, he shall be liable on conviction on indictment or on summary conviction to imprisonment for a term not exceeding six months, or to a fine not exceeding two hundred pounds, or to both such imprisonment and fine.

(2) Any person aggrieved by a summary conviction under this Act may, in England or Ireland, appeal to a court of quarter sessions, and in Scotland in like manner as in the case of a conviction under the Motor Car Act, 1903, as provided by section eighteen of that Act.

Short title

III.—This Act may be cited as the Aerial Navigation Act 1911.

II

An Act to amend the Aerial Navigation Act, 1911

(*14th February*, 1913.)

Be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords

Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Extension of power of Secretary of State to regulate aircraft

I.—(1) The purposes for which a Secretary of State may make orders prohibiting the navigation of aircraft over prescribed areas under the Aerial Navigation Act, 1911, shall include the purposes of the defence or safety of the realm, and, where an order is made for those purposes, the area prescribed may include the whole or any part of the coastline of the United Kingdom and the territorial waters adjacent thereto.

(2) The power of the Secretary of State under the said Act shall include power by order to prescribe the areas within which aircraft coming from any place outside the United Kingdom are to land[1] and the other conditions to be complied with by such aircraft, and, if any person contravenes any of the provisions of any such order, he shall be guilty of an offence under the said Act, unless he proves that he was compelled to do so by reason of stress of weather or other circumstances over which he had no control.

Power to compel compliance when aircraft disobeys signals

II.—If an aircraft flies or attempts to fly over any area prescribed under this Act for the purposes of the defence or safety of the realm, or, in the case of an aircraft coming from any place outside the United Kingdom, fails to comply with any of the conditions as to landing prescribed by an order under the last foregoing section, it shall be lawful for any officer designated for the purpose by regulations made by the

[1] See note (3) on page 59, *supra*.

Army Act]

Secretary of State, to cause such signal as may be prescribed by those regulations to be given,[1] and if after such signal has been given the aircraft fails to respond to the signal by complying with such regulations as may be made by the Secretary of State prescribing the action to be taken on such a signal being given, it shall be lawful for the officer to fire at or into such aircraft and to use any and every other means necessary to compel compliance, and every and any such officer and every other person acting in his aid and by his direction shall be and is hereby indemnified and discharged from any indictment, penalty, action, or other proceeding for so doing.

Short title

III.—This Act may be cited as the Aerial Navigation Act, 1913; and the Aerial Navigation Act, 1911, and this Act may be cited together as the Aerial Navigation Acts, 1911 and 1913.

III

EXTRACT FROM THE ARMY ACT, AS AMENDED TO 1914

Impressment of Carriages, etc. Supply of Carriages and Vessels in case of emergency

115 (1) His Majesty by order, distinctly stating that a case of emergency exists, and signified by a Secretary of State, and also in Ireland the Lord

[1] The prescribed signal is given in *Statutory Rule and Order*, No. 243 of 1913 (Home Office), as follows:

"By day: three discharges at intervals of not less than ten seconds of a projectile showing smoke on bursting.

"By night: three discharges at intervals of not less than ten seconds of a projectile showing red stars or red lights."

The signals must be given by a commissioned officer of the navy or army, and the aircraft must land at the nearest practicable spot.

Lieutenant by a like order, signified by the Chief Secretary or Under Secretary, may authorise any general or field officer commanding His Majesty's regular forces in any military district or place in the United Kingdom to issue a requisition under this section (hereinafter referred to as a requisition of emergency).

(2) The officer so authorised may issue a requisition of emergency under his hand reciting the said order, and requiring justices of the peace to issue their warrants for the provision, for the purpose mentioned in the requisition, of such carriages and animals as may be provided under the foregoing provisions, and also of carriages of every description (including motor cars and other locomotives, whether for the purpose of carriage or haulage), and of horses of every description, whether kept for saddle or draught, and also of vessels (whether boats, barges, or other) used for the transport of any commodities whatsoever upon any canal or navigable river and also of aircraft of every description.

(3) A justice of the peace, on demand by an officer of the portion of His Majesty's forces mentioned in a requisition of emergency, or by an officer of the Army Council authorised in this behalf, and on production of the requisition, shall issue his warrant for the provision of such carriages, animals, vessels, and aircraft as are stated by the officer producing the requisition of emergency to be required for the purpose mentioned in the requisition ; the warrant shall be executed in the like manner, and all the provisions of this Act as to the provision for furnishing carriages and animals, including those respecting fines on officers, non-commissioned officers, justices, constables, or owners of carriages or animals, shall apply in like manner as in the case where a justice issues, in pursuance of the foregoing provisions of this Act, a warrant for the provision of carriages and animals, and shall apply to

vessels and aircraft as if the expression carriages included vessels and aircraft.

(3A) A requisition of emergency may authorise any officer mentioned therein to require any carriages and horses furnished in pursuance of this section to be delivered at such place (not being more than one hundred miles in the case of a motor car or other locomotive, and not being more than ten miles in the case of any other carriage or horse, from the premises of the owner) and at such time as may be specified by any officer mentioned in the requisition, and in such case it shall be the duty of a constable executing a warrant issued by a justice of the peace under this section upon the demand of an officer producing the requisition of emergency to insert in his order such time and place for delivery of any vehicle or horse to which the order relates as may be specified by such officer, and the obligation of owners to furnish carriages and horses shall include an obligation to deliver the carriages and horses at such place and time as may be specified in such order, and the provisions of this Act shall have effect as if references therein to the furnishing of carriages and horses included, as respects any such carriage or horse as aforesaid, delivery at such time and place as aforesaid.

(4) The Army Council shall cause due payment to be made for carriages, animals, vessels, and aircraft furnished in pursuance of this section, and any difference respecting the amount of payment for any carriage, animal, vessel, or aircraft shall be determined by a county court judge having jurisdiction in any place in which such carriage, animal, vessel, or aircraft was furnished or through which it travelled in pursuance of the requisition.

(5) Canal, river, or lock tolls are hereby declared not to be demandable for vessels while employed in any service in pursuance of this section or returning

thereform. And any toll collector who demands or receives toll in contravention of this exemption shall on summary conviction, be liable to a fine not exceeding five pounds nor less than ten shillings.

(6) A requisition of emergency, purported to be issued in pursuance of this section and to be signed by an officer therein stated to be authorised in accordance with this section, shall be evidence, until the contrary is proved, of its being duly issued and signed in pursuance of this Act, and if delivered to an officer of His Majesty's forces or of the Army Council shall be a sufficient authority to such officer to demand carriages, animals, vessels, and aircraft in pursuance of this section, and when produced by such officer shall be conclusive evidence to a justice and constable of the authority of such officer to demand carriages, animals, vessels, and aircraft in accordance with such requisition ; and it shall be lawful to convey on such carriages, animals, vessels, and aircraft, not only the baggage, provisions, and military stores of the troops mentioned in the requisition of emergency, but also the officers, soldiers, servants, women, children, and other persons of and belonging to the same.

(7) Whenever a proclamation ordering the Army Reserve to be called out on permanent service or an order for the embodiment of the militia is in force, the order of His Majesty authorising an officer to issue a requisition of emergency may authorise him to extend such requisition to the provision of carriages, animals, vessels, and aircraft for the purpose of being purchased, as well as of being hired, on behalf of the Crown.

(8) Where a justice, on demand by an officer and on production of a requisition of emergency, has issued his warrant for the provision of any carriages, animals, vessels or aircraft, and any person ordered in pursuance of such warrant to furnish a carriage, animal, vessel, or

aircraft refuses or neglects to furnish the same according to the order, then, if a proclamation ordering the Army Reserve to be called out on permanent service, or an order for the embodiment of the militia is in force, the said officer may seize (and if need be by force) the said carriage, animal, vessel, or aircraft, and may use the same in like manner as if it had been furnished in pursuance of the order, but the said person shall be entitled to payment for the same in like manner as if he had duly furnished the same according to the order.

(9) The Army Council may, by regulations under the Territorial and Reserve Forces Act, 1907, assign to county associations established under that Act the duty of furnishing in accordance with the directions of the Army Council, such carriages, animals, vessels, and aircraft as may be required on mobilisation for the regular or auxiliary forces, or any part thereof, and where such regulations are made an officer of a county association shall have the same powers as are by this section conferred on an officer of the Army Council.

Offences in relation to the Impressment of Carriages. Offences by Constables

116.—Any constable who—

(1) Neglects or refuses to execute any warrant of a justice, requiring him to provide carriages, animals, vessels, or aircraft; or

(2) Receives, demands, or agrees for any money or reward whatsoever to excuse or relieve any person from being entered in a list as liable to furnish, or from being required to furnish, or from furnishing any carriage, animal, vessel, or aircraft; or

(3) Orders any carriage, animal, vessel, or aircraft to be furnished for any person or purpose or on any

occasion for and on which it is not required by this Act to be furnished,

shall on summary conviction, be liable to a fine of not less than twenty shillings nor more than twenty pounds.

Offences by Persons ordered to furnish Carriages, Animals, or Vessels

117.—A person ordered by any constable in pursuance of this Act to furnish a carriage, animal, vessel, or aircraft who—

(1) Refuses or neglects to furnish the same according to the orders of such constable and this Act ; or

(2) Gives or agrees to give to a constable or to any officer or non-commissioned officer any money or reward whatsoever to be excused from being entered in a list as liable to furnish, or from being required to furnish, or from furnishing, or in lieu of furnishing, any carriage, animal, vessel, or aircraft in pursuance of this Act ; or

(3) Does any act or thing by which the execution of any warrant or order for providing or furnishing carriages, animals, vessels, or aircraft is hindered,

shall, on summary conviction, be liable to pay a fine of not less than forty shillings nor more than ten pounds.

Offences by Officers or Soldiers

118.—(1) Any officer or soldier who commits any offence in relation to the impressment of carriages for which he is liable to be punished under Part One of this Act, other than an offence in respect of which any other remedy is given by this part of this Act to the person aggrieved, shall, on summary conviction, be

liable to a fine not exceeding fifty pounds nor less than forty shillings.

(2) A certificate of a conviction for an offence under this section shall be transmitted by the court making such conviction to the Army Council.

Supplemental Provisions as to Billeting and Impressment of Carriages

Application to Court of Summary Jurisdiction respecting sums due to Keepers of Victualling Houses or Owners of Carriages, etc.

119.—(1) The following persons ; that is to say,—

(*a*) If any officer or soldier fails to comply with the provisions of this part of this Act with respect to the payment of a sum due to a keeper of a victualling house or in respect of carriages or animals, or to the making up of an account of the same due, the person to whom the sum is due ; or

(*b*) If a keeper of a victualling house suffers any ill-treatment by violence, extortion, or making disturbance in billets from any officer or soldier billeted upon him, or if the owner or driver of any carriage, animal, vessel, or aircraft furnished in pursuance of this part of this Act suffers any ill-treatment from any officer or soldier, the person suffering such ill-treatment, but, when there is an officer commanding such officer or soldier present at the place, only after first making due complaint, if practicable to such commanding officer,

may apply to a court of summary jurisdiction, and such court, if satisfied on oath of such failure or such ill-treatment, and of the amount fairly due to the

applicant, including the costs of his application to the court of summary jurisdiction, shall certify the same to the Army Council, who shall forthwith cause the amount due to be paid.

(2) Provided that the Army Council, if it appear to them that the amount named in such certificate is not justly due, or is in excess of the amount justly due, may direct a complaint to be made to a court of summary jurisdiction for the county, borough, or place for which the court giving the certificate acted, and the court after hearing the case may by order confirm the said certificate, or vary it in such manner as to the court seems just.

Provisions as to Constables, Police Authorities, and Justices

120.—(1) A constable shall observe the directions given to him for the due execution of this part of this Act by the police authority ; and the police authority, or any member thereof, and every justice of the peace may, if it seem necessary, and in the absence of a constable shall, themselves or himself, exercise the powers and perform the duties by this part of this Act vested in or imposed on a constable, and in such case every such person is in this part of this Act included in the expression "constable."

(2) A person having or executing any military office or commission in any part of the United Kingdom shall not, directly or indirectly, be concerned, as a justice or constable, in the billeting of or appointing quarters for any officer or soldier or horse of the corps, or part of a corps, under his immediate command, and all warrants, acts, and things made, done, and appointed by such person for or concerning the same shall be void.

Fraudulent Claim for Carriages, Animals, etc.

121.—If any person—

(1) Forges or counterfeits any route or requisition of emergency, or knowingly produces to a justice or constable any route or requisition of emergency so forged or counterfeited ; or

(2) Personates or represents himself to be an officer or soldier authorised to demand any billet, or any carriage, animal, vessel, or aircraft, or to be entitled to be billeted, or to have his horse billeted ; or

(3) Produces to a justice or constable a route of requisition which he is not authorised to produce, or a document falsely purporting to be a route or requisition,

he shall be liable, on summary conviction, to imprisonment for a period not exceeding three months, with or without hard labour, or to a fine not less than twenty shillings and not more than five pounds.

APPENDIX X

"Précis" of the Franco-German Agreement as to the Admission of German Aircraft to France and of French Aircraft to Germany (1913).

[For the sake of clearness, the case of German aircraft entering France is alone mentioned in the following *précis*, but the corresponding case of French aircraft entering Germany is subject to identical rules.]

I.

German military aircraft, or other German aircraft carrying officers or soldiers in uniform, may only circulate over French territory or land there upon the invitation of the French Government.

In cases of necessity, however, a German aircraft may be allowed entry, but to prevent cases of this kind arising, the German Government will give the necessary instructions to its airmen.

In such cases, the aircraft must make the signal of distress and land as soon as possible. The pilot must then notify the nearest French authority, stating his name and domicile, and that authority will take steps for the protection of the aircraft and its contents. The local authority will notify the nearest military authority.

The military authority will inquire into the alleged case of necessity, to determine whether the entry was justified or not.

If the justification is established by this inquiry, the military authority will obtain from the German officer in charge of the aircraft his word of honour that neither he nor any member of the crew has committed any act affecting the national security of the French State, such as the taking of notes or of photographs or the dispatch of wireless messages. The aircraft will then be authorised to return to Germany, by such route as the military authority shall direct.

Where an immediate return to Germany is not practicable, the aircraft, while in France, shall not be subject to any measures save such as are necessary for its safety, and that of its crew and contents, and for the public health.

If it is not established at the inquiry referred to above that the entry was justified by necessity, the judicial authorities will be notified and the French Government will be advised.

The French and German Governments will keep one another advised of the nature of the distinguishing marks of their respective military aircraft.

II.

As regards the entry into France of German aircraft not belonging to the military service and not carrying officers in uniform, this is permitted, except in the prohibited zones [fortresses, defences], subject to the following conditions :—

(1) The aircraft must have a licence to navigate from the proper German authority, and must carry the distinctive marks necessary for its identification.

(2) The pilot must have a proficiency certificate from the proper authority.

(3) He must also have papers certifying his nation-

ality and his *situation militaire;* so must any members of the crew.

(4) He must have a passport for the journey from the diplomatic or consular representatives of France in Germany.

Aircraft thus admitted must submit to all the requirements of International Law, of the Customs regulations, and of the Aeronautical regulations in force in France.

Aircraft not fulfilling the above conditions may be admitted in cases of necessity, but such aircraft must land as soon as possible and notify the nearest civil authority.

III.

Whenever a German aircraft lands in France, the local authorities will take all steps necessary to ensure the protection of the aircraft and its crew.

The two Governments will advise one another of their respective regulations as to aerial circulation.

The present agreement is based on reciprocity of treatment. It will cease to be in force when determined by either Government.

(International Law Association, Report of Madrid Conference, 1913, pages 542–545).

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